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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 607

The State of Missouri, at the Relation of Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executor of the Estate of Floyd E. Jacobs, Deceased; and Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs, Deceased.

Appellants,

vs.

Jack L. Clay (Successor to C. Lawrence Leggett), Superintendent of the Division of Insurance, Department of Business and Administration of the State of Missouri,

Respondent.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

JURISDICTIONAL STATEMENT

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INDEX

Jurisdictional Statement 1

(a) Opinion Below 2

(b) Statement of the Grounds on Which Jurisdiction of This Court Is Invoked 2

(c) The Questions Presented by This Appeal 7

(d) Statement of Facts 9

Manner of Raising Federal Constitutional Questions 15

(e) The Federal Questions Are Substantial 18

1. Denial of Access to a Judicial or Quasi Judicial Forum and a Judicial or Quasi Judicial Remedy As Denial of Due Process 23

2. Impairing the Obligations of Plaintiffs' Contract 25

3. Equal Protection of the Law 28

Proof of Service 36

Appendix—

United States Constitutional Provisions A1

Fourteenth Amendment A1

Missouri Constitutional Provisions A1

Statutes A2

Judgment in Case No. 48717 in the Cole County, Missouri, Circuit Court A7

Judgment in Case No. 48716 in the Cole County, Missouri, Circuit Court A8

Opinion of Supreme Court of Missouri A9

Appellants' Motion for Rehearing or in the Alternative for Transfer to the Court en Banc A27

Suggestions in Support of Appellants' Motion for Rehearing or in the Alternative for Transfer to the Court, en Banc A34
Notice of Appeal to the Supreme Court of the United States A41

CASES CITED

Aetna Ins. Co. v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164 10, 11, 12, 19, 30
Barbier v. *Connolly*, 113 U.S. 27, 5 S. Ct. 357, 28 L. Ed. 923 23, 31
Barker v. *Jacobs*, 295 S.W.2d 836 15, 28
Barker v. *Leggett*, 295 S.W.2d 836 8, 12, 14, 16, 19, 21, 30
Bell v. *Hood*, 327 U.S. 678, 66 S. Ct. 773, 777, 90 L. Ed. 939 18
Bolling v. *Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 694, 98 L. Ed. 884 25
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673, 679-683, 60 S. Ct. 451, 454 24
Charleston Federal S. and L. Ass'n v. *Alderson*, 324 U.S. 182, 185-186, 65 S. Ct. 624, 627 18
Cities Service Gas Co. v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 71 S. Ct. 215, 95 L. Ed. 190 6
Crane v. *Johnson*, 242 U.S. 339, 37 S. Ct. 176, 61 L. Ed. 348 6
Detroit Bank v. *United States*, 317 U.S. 329, 338, 63 S. Ct. 297, 301, 87 L. Ed. 304 25
Ebling v. *Hardesty*, Mo. App., 354 S.W.2d 348, 350 (2) 10
Faitoute Iron & Steel Co. v. *City of Asbury Park, N. J.*, 316 U.S. 502, 544, 62 S. Ct. 1129 27
Galvan v. *Press*, 347 U.S. 522, 530, 74 S. Ct. 737, 742, 98 L. Ed. 987 25
Gibbs v. *Zimmerman*, 290 U.S. 326, 332, 54 S. Ct. 140, 142, 78 L. Ed. 342 25
Hartford Steam Boiler Inspection & Ins. Co. v. *Harrison*, 301 U.S. 459, 461, 57 S. Ct. 638 33
Hawk v. *Olson*, 326 U.S. 271, 276, 66 S. Ct. 116, 119, 90 L. Ed. 61 6

Hill v. *State of Texas*, 316 U.S. 400, 406, 62 S. Ct. 1159, 1162, 86 L. Ed. 1559 33
Home Building & Loan Ass'n v. *Blaisdell*, 290 U.S. 398, 429-431, 54 S. Ct. 231 28
Jacobs v. *Jacobs*, 272 S.W.2d 185, 188 (2) 10
Jacobs v. *Leggett*, 295 S.W.2d 825 2, 7, 8, 12, 14, 15, 16, 19, 21, 26, 28, 30
Johnson v. *Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 18
Lathrop v. *Donohue*, 367 U.S. 820, 824, 81 S. Ct. 1826, 1828, 6 L. Ed. 2d 191 6
McCabe v. *Railway*, 235 S.W.2d 151, 161, 35 S. Ct. 69, 59 L. Ed. 169 31
Missouri v. *Lewis*, 101 U.S. 22, 30, 25 L. Ed. 989 24, 31
Mosley v. *St. Louis Public Service Co.*, Mo. Sup., 301 S.W.2d 797, 800 (2) 20
Nibler v. *Coltrane*, Mo. Sup., 275 S.W.2d 270 28
Ohio Oil Company v. *Conway*, 281 U.S. 146, 160, 50 S. Ct. 310 32
Oyama v. *State of California*, 332 U.S. 633, 636, 68 S. Ct. 269 22
Poulos v. *State of New Hampshire*, 345 U.S. 395, 403, 73 S. Ct. 760, 765, 97 L. Ed. 1105 7
Raley v. *State of Ohio*, 360 U.S. 423, 436, 79 S. Ct. 1257, 1265 18
Richmond Mortg. & Loan Corp. v. *Wachovia Bank & Trust Co.*, 300 U.S. 124, 128, 57 S. Ct. 388 27
Scheufler v. *Manufacturing L. Underwriters*, 349 Mo. 855, 163 S.W.2d 749 4
Schuylkill Trust Co. v. *Commonwealth of Pennsylvania*, 296 U.S. 113, 58 S. Ct. 31, 80 L. Ed. 91 18
Shelley v. *Draemer*, 334 U.S. 1, 20, 68 S. Ct. 836 6, 22, 27
Smith v. *Cahoon*, 283 U. S. 553, 566-567, 51 S. Ct. 582 34
Smith v. *St. Louis Public Service Co.*, 364 Mo. 104, 259 S.W.2d 692 21
State ex rel. Johnson v. *Leggett*, 359 S.W.2d 790, 792 9, 10, 11, 12, 13, 14, 31

State ex rel. Leggett v. *Jensen*, 318 S.W.2d 353 8, 13, 14, 15, 17, 20, 21, 26, 28
State ex rel. Lucas v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106 8, 26, 32
State of Missouri v. *Canada*, 305 U.S. 337, 350, 351, 59 S. Ct. 232, 236, 237, 83 L. Ed. 208 31
Staub v. *City of Baxley*, 355 U.S. 313, 319, 78 S. Ct. 277, 280, 2 L. Ed. 2d 302 6, 18
Taylor v. *United States*, D.C., Ct. App., 238 F.2d 259, 261 18
Truax v. *Raich*, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 6
W. B. Worthen Co. v. *Kavanaugh*, 295 U.S. 56, 62, 55 S. Ct. 555, 557 27
Weatherby, Barker and Jacobs v. *Jackson*, 359 Mo. 542, 215 S.W.2d 742 12, 30
Wheeling Steel Corporation v. *Glander*, 337 U.S. 562, 570, 69 S. Ct. 1261 22, 27
Winters v. *People of the State of New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 7

AUTHORITIES CITED

Article IV, Section 22, Mo. Const., 1945 5, 22
Article V, Section 9, Missouri Constitution, 1949 4
Article X, Section 1, Constitution of the United States 6, 9
Fourteenth Amendment to the Constitution of the United States 5, 6, 7, 8, 9, 25, 31
Sections 374.160 and 374.220, R.S. Mo. 1949 3, 22
Section 374.160, R.S. Mo. 1959 5, 8, 11, 12, 13, 22
Section 536.100, R.S. Mo. 1959 19
Section 536.105, R.S. Mo. 1959 3, 5, 7, 9, 13
Section 536.110, R.S. Mo. 1959 19
Sections 536.105, 374.120, 374.160, 374.220, 374.230 and 374.260, R.S. Mo., 1949 5, 8, 12, 13, 30
Missouri Administrative Procedure Act (Chapter 536, Missouri Revised Statutes, 1959) 2, 7, 8, 13
Missouri Insurance Code (Chapter 374, R.S. Mo. 1959) 2, 7, 9, 28
Title 28, U.S.C., Section 1257 4, 5, 6, 35

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Jack L. Clay (Successor to C. Lawrence Leggett), Superintendent of the Division of Insurance, Department of Business and Administration of the State of Missouri,

Respondent.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of Missouri entered on July 16, 1962, and submit this

statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial Federal question is presented.

(a) OPINION BELOW

The opinion of the Supreme Court of Missouri (Appendix pp. A9-A26) is reported in 359 S.W.2d 790.

(b) STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(References are to the official transcript as certified by the Clerk of the Supreme Court of Missouri.)

(i) This is an appeal of two actions (consolidated and tried as one action in the Supreme Court of Missouri) brought in the Circuit Court of Cole County, Missouri, under the Missouri Administrative Procedure Act (Chapter 536, Missouri Revised Statutes, 1959) to review the decisions of Respondent Superintendent of Insurance of the State of Missouri (operating as an administrative agency under said Act) denying recovery on claims presented to him for attorneys' fees for services to the Division of Insurance for allowance and payment under the provisions of the Missouri Insurance Code (Chapter 374, R.S. Mo. 1959).

These claims were originally filed by two distinguished Missouri lawyers, Honorable John T. Barker and Honorable Floyd E. Jacobs. During the pendency of these proceedings both claimants died and the claim of General Barker is now being prosecuted by his daughter, Mildred B. Johnson, as his Administratrix, and the claim of Mr. Jacobs is now being prosecuted by his widow, Mary G. Jacobs, as executrix (Tr. 2, 82).

Mr. C. Lawrence Leggett, the Superintendent of Insurance who ruled adversely on these claims was succeeded in that office by Honorable Jack L. Clay, and the latter was substituted as party Respondent herein.

(ii) These claims were filed in writing before the Superintendent of Insurance in the year 1936, and remained pending before the Superintendent and undisposed of continuously thereafter (despite the continuous efforts of claimants to obtain a hearing) until February 7, 1958, when the Superintendent refused without notice to take jurisdiction and denied and dismissed the claims without a hearing (Tr. 6-7, 16, 24, 57, 58, 89-90, 110, 111, 143, 144).

Following the ruling by the Superintendent they filed two petitions for review of the order of the Superintendent in the Cole County, Missouri, Circuit Court, each in two count: Case No. 48716 for Mandamus and Certiorari (Tr. 1-62) and Case No. 48717 for Injunction and Declaratory Judgment (Tr. 82-108). Thus invoking all the review procedures provided by the applicable statute, Section 536.105, R.S. Mo. 1959. In the latter case Aetna Insurance Company, State Farm Mutual Insurance Company and Hardware Mutual Casualty Company were joined with the Superintendent as defendants as interested parties who might be required to contribute to the payment of fees under Sections 374.160 and 374.220, R.S. Mo., 1949 (Tr. 86, 87).

The Cole County Circuit Court sustained motions to dismiss Plaintiffs' petitions as to both counts on behalf of all defendants on the grounds said petitions failed to state claims upon which relief might be granted and upon their motions for new trial being overruled plaintiffs appealed to the Supreme Court of Missouri (Tr. 67, 71, 72, 73, 74, 166-169). The cases were consolidated in the Missouri Supreme Court for hearing and opinion.

The Opinion and Judgment of Division No. I of the Supreme Court of Missouri, in the consolidated case adverse to Appellants was entered on July 16, 1962 (Tr. 412-428). Appellant filed a timely Motion for rehearing or in the Alternative for transfer to the Supreme Court of Missouri, *en Banc*, in Division No. I of said Court which was overruled by that Division on September 10, 1962 (Tr. 429-444). Transfers of causes from Division to the Court, *en Banc*, of the Missouri Supreme Court may be ordered only by the Division having jurisdiction. Article V, Section 9, Missouri Constitution, 1949; *Scheufler* v. *Manufacturing L. Underwriters*, 349 Mo. 855, 163 S.W.2d 749. Upon Division No. I of the Missouri Supreme Court overruling Appellants' Motion for Rehearing or in the alternative for Transfer to the Court, *en Banc*, Appellants had exhausted all remedies in the State of Missouri and been precluded from recovery by the highest Court in the State of Missouri in which a decision could be had by reason of Division No. 1 of said Court refusing to transfer said cause to the Court, *en Banc*.

Notice of Appeal to the Supreme Court of the United State was served on counsel for the adverse parties and timely filed with Division No. 1 of the Supreme Court of Missouri on September 22, 1962 (Tr. 449-453, 487, Appendix pp. A41-A45).

(iii) The jurisdiction of the Supreme Court of the United States to review this decision is invoked under Title 28, U.S.C., Section 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> * * *

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The action of the State of Missouri in denying plaintiffs a judicial or quasi judicial remedy for adjudication of their rights under contract for legal services rendered the State admitted to be valid and fully performed is drawn in question as being repugnant to the Fourteenth Amendment to the Constitution of the United States.

The action of the State of Missouri in referring plaintiffs to the Missouri Legislature, a purely political body, for their sole remedy under a valid fully executed contract is drawn in question as being repugnant to the Fourteenth Amendment to the Constitution of the United States, particularly since the Missouri Insurance Department is required to be self-sustaining under the specific provisions of Sec. 374.160, R.S. Mo. 1959, and Missouri has a Constitutional Budget System (Article IV, Section 22, Mo. Const., 1945, and Section 374.160, R.S. Mo., 1959) which forbids the Missouri Legislature from appropriating funds for any unbudgeted purpose, except emergency appropriations recommended by the Governor, until all of the items in the executive budget have been acted upon.

The action of the State of Missouri through its Superintendent of Insurance and its Courts in refusing to afford or make available to plaintiffs means for auditing, allowing and budgeting funds for payment of plaintiffs' claims is also drawn in question as repugnant to the Fourteenth Amendment to the Constitution of the United States.

There was here drawn in questions Sections 536.105, 374.120, 374.160, 374.220, 374.230 and 374.260, R.S. Mo.,

1949, on the grounds that as construed by the Supreme Court of Missouri they are arbitrary, capricious, discriminatory, deny plaintiffs their civil rights to a judicial or quasi judicial forum and judicial or quasi judicial remedy and therefore repugnant to the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States and impaired their right to contract and the obligation of their contract in violation of Article X, Section 1 of the Constitution of the United States.

The decision of the Supreme Court of Missouri was in favor of their validity (359 S.W.2d 790).

(iv) The following decisions are believed to sustain the jurisdiction of this Court to review the judgment of the Supreme Court of Missouri on the ground there was drawn in question the validity of statutes of the State of Missouri on the grounds they were repugnant to the Constitution of the United States and the decision of the Supreme Court of Missouri was in favor of their validity (28 U.S.C. 1257 (2)).

Cities Service Gas Co. v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 71 S. Ct. 215, 95 L. Ed. 190.

Crane v. *Johnson*, 242 U.S. 339, 37 S. Ct. 176, 61 L. Ed. 348.

Truax v. *Raich*, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131.

Lathrop v. *Donohue*, 367 U.S. 820, 824, 81 S. Ct. 1826, 1828, 6 L. Ed. 2d 191.

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Shelley v. *Kraemer*, 334 U.S. 1, 14, 15, 17, 68 S. Ct. 836, 842, 843, 844 (5, 6, 11), 92 L. Ed. 161.

Winters v. *People of the State of New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840.
Poulos v. *State of New Hampshire*, 345 U.S. 395, 403, 73 S. Ct. 760, 765, 97 L. Ed. 1105.

(v) The relevant provisions of the Statutes involved are set out in the Appendix.

(c) THE QUESTIONS PRESENTED BY THIS APPEAL

1. Whether the Superintendent of Insurance, the Trial Court and Division No. I of the Missouri Supreme Court in holding the Superintendent of Insurance and the Courts of Missouri are powerless to give plaintiffs a judicial or quasi judicial adjudication of their right to be paid under the provisions of the Missouri Insurance Code (Chapter 374, R.S. Mo. 1959) for services admittedly fully performed for the Division of Insurance under a valid contract in direct conflict with controlling decisions of the Missouri Supreme Court, *en Banc*, in *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836, and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, holding they do have rights to such an adjudication under either Sections 374.160 and 374.260 or under 374.220, R.S. Mo. 1959, with a specific procedural remedy under Section 536.105, R.S. Mo. 1959, of the Missouri Administrative Procedure Act are not arbitary, capricious, discriminatory and deny plaintiffs their civil rights to equal protection of the law and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

2. Whether in refusing to take jurisdiction and grant plaintiffs a means of adjudicating their claims on the grounds the Superintendent possessed no power or authority to allow and provide for payment of plaintiffs' claim

for legal services, the Superintendent, the Trial Court and Division No. I of the Missouri Supreme Court denied plaintiffs access to the courts and denied them their civil rights to a right to a judicial or quasi judicial remedy in violation of the Fourteenth Amendment to the Constitution of the United States?

3. Whether in denying plaintiffs the right to an adjudication of their rights under an admittedly valid contract admittedly fully performed, the Superintendent, the Trial Court and Division No. I of the Missouri Supreme Court so construed Sections 536.105, 374.160, 374.230, 374.260 and 374.220 as to deprive plaintiffs of their civil rights to a judicial or quasi judicial forum and denied them a judicial or quasi judicial remedy, not only impaired their right to contract and the obligation of their contract, but denied them due process of law in violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States?

4. Whether in denying plaintiffs the benefit of the Administrative Procedure Act, Chapter 536, R.S. Mo. 1959, to adjudicate rights to which they were entitled under Sections 374.160 and 374.260 or under Section 374.220, R.S. Mo., 1959, afforded others similarly situated and which the Supreme Court of Missouri, *en Banc*, in the cases of *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106; *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836, and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, held applicable, the Superintendent, the Trial Court and Division No. I of the Missouri Supreme Court have acted arbitrarily, capriciously and discriminated against these plaintiffs and deprived these plaintiffs of the "equal right to resort to the appropriate courts for redress" in violation of the Fourteenth Amendment to the Constitution of the United States?

5. Whether in denying plaintiffs any judicial or quasi judicial remedy or judicial or quasi judicial forum for adjudication of their rights under their admittedly valid contract fully performed the Superintendent, the Trial Court and Division No. I of the Supreme Court of Missouri have struck down or arbitrarily and substantially impaired plaintiffs' civil rights to liberty to contract about their affairs and impaired the obligation of their contract, thereby discriminating against them and violating their statutory rights, and in doing so impaired the obligation of their contract and deprived them of their right to contract guaranteed them under Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States?

6. Whether in holding the plaintiffs had a valid contract and were entitled to be paid but denying them the right to judicial or quasi judicial means of enforcement of their contractual rights under Chapter 374 of the Missouri Insurance Code (Chapter 374, R.S. Mo. 1959) and Section 536.105, R.S. Mo. 1959, which are also property rights, the opinion and judgment herein are capricious, arbitrary and discriminatory and deprive plaintiffs of their civil right to be protected against impairment of their contract by the State, including the means of enforcement in violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States.

(D) STATEMENT OF FACTS.

In the opinion herein the Court said:

> "The facts are not in dispute." *State ex rel. Johnson* v. *Leggett*, Mo. Sup., 359 S.W.2d 790, 792.

Except for certain omissions such as the fact plaintiffs had claims on file with the superintendent continuously

from 1936 until 1958 (Tr. 5-7, 88-89) which the superintendent refused to act on, and the erroneous conclusions that plaintiffs' constitutional claims had been finally adjudicated against them and had been waived by them, the facts stated in the opinion are not questioned.

As the cases were dismissed on motion on the ground they failed to state a claim upon which relief could be granted the facts come from Plaintiffs' petitions and must be accepted as true (Tr. 71-72, 166-169). *State ex rel. Johnson* v. *Leggett*, Mo. Sup., 359 S.W.2d 790, 792; *Jacobs* v. *Jacobs*, Mo. Sup., 272 S.W.2d 185, 188 (2); *Ebling* v. *Hardesty*, Mo. App., 354 S.W.2d 348, 350 (2).

In June, 1930, two distinguished Missouri lawyers, John T. Barker and Floyd E. Jacobs, were employed by the Superintendent of Insurance of Missouri in writing with the approval of the Governor and Attorney General of that State to institute proceedings against approximately 155 stock fire insurance companies for restitution of excessive premiums collected by them in violation of the Superintendent's ten percent rate reduction order effective November 15, 1922. *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, 1165, 1167; *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d, l.c. 792.

Under the terms of said contract said attorneys were to be paid a reasonable fee for their services out of the recaptured excess premiums. If not successful said attorneys were to receive no pay. *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, 1165-66. *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d, l.c. 792.

From June, 1930 to 1936 said attorneys prosecuted said litigation in accordance with their contract, paid the expenses of their litigation out of their personal funds and succeeded in recapturing the sum of $2,751,000.00, and

after all policyholders had been paid who could be found there remained a fund of $2,160,871.32. *Aetna Ins. Co.* v. *O'Malley*, 124 S.W.2d, l.c. 1166, *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d, l.c. 792-3. A general outline of the services performed by plaintiffs may be found in plaintiffs' Exhibit 1 (Tr. 23-38, 108-123). *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d, l.c. 796.

Upon said recaptured funds being paid into Court, Barker and Jacobs filed a motion and application for the allowance of attorney's fees in the Cole County Circuit Court to be made a lien upon said fund; upon a hearing an order was made allowing said attorneys $275,000.00 and declaring such allowance a lien upon said fund. *Aetna Ins. Co.* v. *O'Malley*, l.c. 1166. *State ex rel.* v. *Leggett*, 359 S.W.2d, l.c. 793.

The Superintendent appealed and upon such appeal the Supreme Court of Missouri held said attorneys had a valid contract for services, that they had rendered valuable services but that the fund was a sacred fund for the policyholders and was not subject to the payment of such fees. *Aetna Ins. Co.* v. *O'Malley*, 124 S.W.2d 1164, 1166-1168, *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d, l.c. 793.

In the year 1936 and repeatedly and continuously thereafter said attorneys made claims for and requested the Superintendent to audit, fix, allow and pay their claims for services under said contract of employment; said claims remained on file and pending before the Superintendent continuously from 1936 to February 7, 1958, when the Superintendent, without notice or any hearing peremptorily dismissed and denied said claims stating he could not allow the claims as expenses of the Insurance Department under Section 374.160, R.S. Mo., 1959, nor could he allow such claims as expenses in proceedings against

insurance companies under Sections 374.160 and 374.220 R.S. Mo. (Tr. 16, 63, 64, 57, 58, 88, 89, 93, 95, 98). *State ex rel* v. *Leggett*, 359 S.W.2d, l.c. 793, 794, 795, 796, 797.

At various times from 1936 to 1957 in addition to their claims pending before the Superintendent said attorneys sought satisfaction of their claims out of the fund created by the recaptured excess premiums by applications to the legislature and by action in quantum meruit and other legal proceedings all without avail. *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d, l.c. 794-5; *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W. 1164; *Barker* v. *Leggett*, D. C., 102 F. Supp. 642; *Weatherby, Jacobs and Barker* v. *Jackson*, Mo. Sup., 358 Mo. 542, 215 S.W.2d 742; *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825; *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 836.

In the latter two cases of Jacobs and Barker the Court held that the superintendent of insurance should allow plaintiffs' fees either as regular expenses of the insurance department under Sections 374.160 and 374.260, R.S. Mo. 1959, or as expenses of proceedings against insurance companies under Section 374.220, R.S. Mo. 1959, that said lawyers had a judicial or quasi judicial remedy by appeal from the Superintendent to the Circuit Court under the Missouri Administrative Procedure Act for his unreasonable delay in failure to act or upon action taken by him adverse to them.

Plaintiffs then formally renewed their claims pending before the Superintendent and demanded a hearing. 359 S.W.2d l.c. 796. The Superintendent then requested an opinion from the Attorney General and received the advice that "the circumstances of the present application may be such that a denial of a hearing would be considered by a reviewing court to be an arbitrary and unreasonable

act." 359 S.W.2d l.c. 796. Thereafter the Superintendent, without notice or hearing, peremptorily dismissed said claim and denied any and all relief to said attorneys. 359 S.W.2d l.c. 796-7.

The Superintendent declared he could not allow plaintiff's fees as expenses of the insurance department to be paid out of current appropriations under Section 374.160, R.S. Mo. 1949, nor could he assess such fees as expenses of proceedings against such insurance companies under Sections 374.160 and 374.220, R.S. Mo. 1949 (Tr. 58, 144). *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d l.c. 797.

Said attorneys then proceeding under the Missouri Administrative Procedure Act under authority of the Missouri Supreme Court, *en banc*, in the *Jacobs* and *Barker* cases, *supra*, filed a petition for review of said ruling of the Superintendent in the County of their residence, Jackson County, Missouri, as a contested case under Section 536.100, R.S. Mo. 1959, and as a precautionary measure filed two petitions for review of said ruling in the Circuit Court of Cole County, Missouri, as an uncontested case under Section 536.105, R.S. Mo. 1959. *State ex rel. v. Leggett*, Mo. Sup., 359 S.W.2d l.c. 796, 797.

The Superintendent obtained a Writ of Prohibition in the Jackson County case on the ground that the case was to be classified as uncontested under the statute and that sole venue was in Cole County as an uncontested case under Section 536.105. *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353; *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d l.c. 797.

Said attorneys then pressed their petitions for review of the action of the Superintendent in the Cole County Circuit Court as an uncontested case. That Court then sustained motions of all defendants to dismiss said suits

and each count thereof on the grounds they failed to state facts upon which relief might be granted (Appendix A7, A8 Tr. 71, 72, 166-169). *State ex rel.* v. *Leggett*, 359 S.W.2d l.c. 791, 792.

Plaintiffs timely filed motions for new trial (Tr. 72, 73, 170-173). Said motions for new trial were overruled (Tr. 73, 173) and plaintiffs filed timely notices of appeal to the Supreme Court of Missouri (Tr. 74, 173-174).

After hearing, Division No. 1 of the Missouri Supreme Court affirmed the ruling of the trial court as to both petitions and all counts (359 S.W.2d 790; Tr. 413-428; Appendix A9).

Plaintiffs timely filed their joint motion for rehearing or in the alternative for transfer to the court, *en Banc*, for final hearing and decision (Appendix A27) (Tr. 430-443) which the Court overruled and denied (Tr. 444).

The Supreme Court of Missouri, *en Banc*, in the cases of *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836, and in *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, held it was the duty of the Superintendent of Insurance to hear, audit and allow plaintiffs' fees subject to their right of review in the Circuit Court under the Administrative Procedure Act. Division No. I of that Court in the opinion herein held the Superintendent of Insurance had no duty to hear, audit or allow plaintiff any fees and that there was no remedy for them under the Administrative Procedure Act and then refused to transfer the cause to the Court, *en Banc*, on plaintiffs' Motion thereby finally denying plaintiffs any remedy in the Courts of Missouri.

Thereafter on September 22, 1962, plaintiffs, having exhausted all remedies available to them in the Missouri State Courts, duly served on Respondents and filed in the

Supreme Court of Missouri their notice of appeal to this Court (Tr. 449-453) with proof of service on all adverse parties (Tr. 447).

Plaintiffs also filed in said Supreme Court of Missouri their motion for a stay of the mandate herein for a period of 90 days from September 10, 1962, which was sustained (Tr. 445-448).

The facts are more fully set out in the opinion of Division No. 1 of the Missouri Supreme Court herein (359 S.W.2d 790; Appendix A9) and in the plaintiffs' Petitions herein (Tr. 2-62, 82-123).

MANNER OF RAISING FEDERAL CONSTITUTIONAL QUESTIONS

Plaintiffs' amended claim in writing and on file and before the Superintendent when he dismissed plaintiffs' claim clearly presented the Constitutional issues (Tr. 38, 39, 123-125). Plaintiffs' petitions in the Circuit Court of Cole County clearly presented the Constitutional issues (Tr. 14, 15, 21, 97-99). Such records would seem to satisfy the requirements as to the propriety of the manner of raising the Constitutional questions.

The Missouri Courts have directly passed on the Constitutional questions in this case (359 S.W.2d l.c. 799, 800; and in the previous decisions of the court, *en Banc*, in *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825, 832, 835; *Barker* v. *Jacobs*, Mo. Sup., 295 S.W.2d 836, 840; *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353, 357, 358.

The Missouri Supreme Court is clearly in error herein in stating that the former decisions of the Missouri Supreme Court, *en Banc*, in *Jacobs et al.* v. *Leggett*, 295

S.W.2d 825, 831 (5, 6) and *Barker et al.* v. *Leggett*, 295 S.W.2d 836, "recited facts and quoted from adjudicated cases clearly establishing that plaintiffs had long since waived any constitutional right granted under the 14th Amendment to the Constitution of the United States, * * *; and "that denial of the right to recover did not deprive plaintiffs of any timely pleaded constitutional right * * *." (359 S.W.2d, l.c. 795).

In discussing and ruling the Constitutional questions raised in the *Jacobs* case, *supra*, the Court, *en Banc*, said (295 S.W.2d, l.c. 832):

> "Plaintiffs further contend that they have been deprived of a judicial remedy, thereby denying them due process of law. The remedy denied is their alleged right to be paid out of the fund recovered."

Following the discussion of the Constitutional issues the Court further said (295 S.W.2d, l.c. 832):

> "We rule these assignments against the plaintiffs and hold that they have not been deprived of Constitutional rights."

The Court ruled that the Constitutional issues were alive at that time but that the denial of plaintiffs' right to be paid out of the fund recovered did not violate the Constitution.

In the *Barker* case, *supra*, the Court, *en Banc*, said (295 S.W.2d, l.c. 840):

> "As we have pointed out, administrative remedies are provided with right of judicial review. We have considered these constitutional questions and find them to be without merit."

Again the issue was the right of plaintiffs to be paid out of the fund recovered and the ruling therein that plain-

tiffs then had an administrative remedy necssarily meant a remedy not subject to be defeated on the Constitutional issues just considered and ruled by the Court.

In the subsequent case of *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, in a prohibition case on the question of venue dependent on whether these claims before the Superintendent of Insurance were contested or uncontested claims the Court *en Banc*, said (318 S.W.2d, l.c. 358):

> "The Legislature has now provided an adequate method of judicial review in all cases, namely: review under Sections 536.100 and 536.140 for cases which must be contested in a hearing in the agency before a decision is made; and review under Sec. 536.-150 for cases decided by the agency without a hearing. * * *
>
> "Due process is satisfied if there be either an administrative hearing or the right to have a hearing in a court which may adequately review the administrative decision."

(318 S.W.2d. l.c. 359:)

> "Since either statute provides adequate review to satisfy due process, what we said concerning plaintiffs' constitutional contentions therein was correct."

So again the Court, *en Banc*, recognized plaintiff's Constitutional issues were alive by ruling thereon and holding that an administrative review of plaintiffs' claim under either statute would satisfy the Constitutional requirements.

The Constitutional questions were actually raised, considered and decided by the Court, *en Banc*, in the *Barker*, *Jacobs* and *Jensen* cases, *supra*, and also by Division No. 1 in the present case.

This Court has said it will not concern itself with the time and manner of raising a Constitutional question where the Court below has actually considered and decided the issue as here. *Charleston Federal S. and L. Ass'n* v. *Alderson*, 324 U.S. 182, 185-186, 65 S. Ct. 624, 627; *Raley* v. *State of Ohio*, 360 U.S. 423, 436, 79 S. Ct. 1257, 1265.

Whether a Federal Constitutional question is properly raised below is itself a Federal question. *Schuylkill Trust Co.* v. *Commonwealth of Pennsylvania*, 296 U.S. 113, 58 S. Ct. 31, 80 L. Ed. 91; *Staub* v. *City of Baxley*, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302.

Courts indulge every reasonable presumption against waiver of a fundamental Constitutional right and do not presume acquiescence in the loss of such fundamental rights. *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461; *Taylor* v. *United States*, D.C., Ct. App., 238 F.2d 259, 261; *Bell* v. *Hood*, 327 U.S. 678, 66 S. Ct. 773, 777, 90 L. Ed. 939.

(e) THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Plaintiffs were employed by the Superintendent of Insurance with the approval of the Governor and Attorney General of Missouri to collect the unrefunded premiums from insurance companies collected by them in violation of a rate reduction order. They were to receive reasonable compensation for their services to be paid out of the fund collected. If they collected nothing they were to receive nothing (359 S.W.2d, l.c. 792).

The Cole County Circuit Court allowed plaintiffs a fee of $275,000.00 and declared it a lien upon the funds collected (359 S.W.2d, l.c. 793). The Superintendent appealed and the Supreme Court of Missouri, *en Banc* in

the case of *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, hold the "superintendent of insurance had a right to employ the respondents, but did not have the power to contract that their compensation should be paid out of this fund" for the reason that "in the event the orders and directions of the superintendent be set aside, such funds shall be returned to the companies pro rata, and in the event his orders and directions shall be sustained, then such funds shall be turned over to the policyholders pro rata." (124 S.W.2d, l.c. 1167, 1168). The Court then said "the only way such attorneys can be paid is like any other expense of the insurance department, that is by appropriation of the legislature." (124 S.W.2d, l.c. 1168).

Plaintiffs thereafter from time to time over the years applied for an appropriation by the legislature with no success. (Tr. 8, 9; 359 S.W.2d, l.c. 795).

They were unsuccessful in their attempts to recover from the fund even after all rights of the policyholders had terminated and the remainder of the fund collected in the sum of $2,160,871.32 had escheated to the State (Tr. 30-32, 87-97). *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825; *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 834.

In the latter cases the Court, to escape the obvious unconstitutional effect of a ruling that a denial of any right of adjudication would produce pointed out that plaintiffs did have a remedy under the Missouri Administrative Procedure Act and indicated Section 536.100, R.S. Mo., 1949 as the applicable *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 836, 840. Plaintiffs filed a petition for review in the Jackson County, Missouri, Circuit Court as a contested case, under Sections 536.100 and 536.110, R.S. Mo., 1949. The Superintendent applied to the Supreme Court of Missouri for a writ of prohibition on the ground the case was

not a contested case but an uncontested case with proper venue in Cole County and not in Jackson County. The Supreme Court of Missouri, *en Banc*, made its preliminary rule in prohibition permanent holding the case was not contested, but in answer to plaintiffs' claims of unconstitutionality pointed out plaintiffs had a remedy under Section 536.105 as an uncontested case. *State ex rel. Leggett v. Jensen*, Mo. Sup., 318 S.W.2d 353, 363, 359, 360.

Alerted by twenty years of frustration in attempting to collect a fee under a valid contract for services fully performed resulting in enrichment of the Missouri State Treasury in the sum of $2,160,871.32 as a windfall plaintiffs as a precaution had filed two suits for review of the Superintendent's ruling in the Cole County Circuit Court as uncontested cases under the Missouri Administrative Procedure Act (359 S.W.2d, l.c. 797). After the ruling there was no jurisdiction in the Jackson County Circuit Court plaintiffs pressed for action in the Cole County suits. All defendants filed motions to dismiss the Cole County suits which were sustained on the grounds plaintiffs' petitions, and each count thereof, failed to state claims upon which relief might be granted (Tr. 71, 72, 148-154, 166-169). In ruling said motions on that specific ground the Court overruled all other specifications in said motions. *Mosley v. St. Louis Public Service Co.*, Mo. Sup., 301 S.W.2d 797, 800 (2).

Upon appeal to the Missouri Supreme Court Division No. I the opinion herein affirmed the judgment below and held the refusal of the Superintendent to certify plaintiffs' fees for payment did not deprive plaintiffs of any legal or Constitutional rights 359 S.W.2d, l.c. 799, 800.

This is a Divisional opinion of Division No. I of the Missouri Supreme Court directly contrary to controlling

decisions of the Court, *en Banc*, in this same matter in the cases of *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836 and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, all holding that plaintiffs do have a remedy under these very same statutes.

Furthermore, in so ruling and thereafter denying Appellants' motion for transfer to the Court, *en Banc*, Division No. I denied plaintiffs' recovery and refused to apply the controlling law of Missouri as announced by the Court *en Banc*.

In the case of *Smith* v. *St. Louis Public Service Co.*, 364 Mo. 104, 259 S.W.2d 692, the Court, *en Banc*, said (l.c. 694):

> "[1, 2] It is well settled 'that a decision of the court en Banc is controlling not only upon the appellate and all inferior courts, but upon the divisions of the Supreme Court as well. * * * Although the decision of a division of the court upon a given question is later in point of time than a decision of the court en Banc upon the same question the decision of the Court en Banc is nevertheless the controlling decision. If there is conflict between the later divisional opinion and the earlier decision of the court en Banc, it is the duty of all inferior courts, including the division of the Supreme Court itself, to follow the decision of the Supreme Court en Banc.' State ex rel. Hopkins v. Daues, 319 Mo. 733, 6 S.W.2d 893, 896 [1], Poe v. Illinois Cent. R. Co., 339 Mo. 1025, 99 S.W.2d 82, 84 [2]."

The previous applications of plaintiffs for an appropriation from the legislature have been made as suppliants and in the face of the opposition of the Superintendent of Insurance and his counsel. In the previous applications to the legislature plaintiffs had the support of the decisions of the Missouri Supreme Court holding that plaintiffs were

legally employed, had fully performed and had a legal right to be paid under the provisions of the Missouri Insurance Code.

In holding that the refusal of the Superintendent to allow plaintiffs' fees and certify them for payment under either Sections 374.160 and 374.260 or under Section 374.220, R.S. Mo., 1959, could not "be held to have deprived claimants of fees legally owed Barker and Jacobs", Division No. I not only refused to follow the controlling decisions of the Court *en Banc*, but deliberately and purposely foreclosed any judicial or quasi judicial remedy.

As the Department of Insurance is required to be self-sustaining (Sec. 374.160, R.S. Mo., 1959) and operates under a State Executive Budget Law (Art. IV, Sec. 22, Mo. Const., 1945) the decision herein forecloses any remedy to plaintiffs herein.

In the case of *Shelley* v. *Draemer*, 334 U.S. 1, 20, 68 S. Ct. 836, it is stated (l.c. 845):

> "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands."

In the case of *Wheeling Steel Corporation* v. *Glander*, 337 U.S. 562, 570, 69 S. Ct. 1261, the Court said (l.c. 1296):

> "The State action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation."

In the case of *Oyama* v. *State of California*, 332 U.S. 633, 636, 68 S. Ct. 269, the Court said (l.c. 270):

> "[1] In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

Clearly the construction of these Statutes by Division No. I of the Missouri Supreme Court as affording plaintiffs no judicial or quasi judicial forum or remedy, followed by its blocking any review by the Court, *en Banc*, by denying appellant's motion for transfer to the Court, *en Banc*, in direct contradiction of previous controlling decisions of the Court, *en Banc*, denying plaintiffs any judicial or quasi judicial remedy for services rendered under a valid contract with such success as to bring into the State Treasury the sum of $2,160,871.32 as a windfall raise substantial Federal questions which have been presented to the Missouri judicial tribunals, but denied by them.

1. Denial of Access to a Judicial or Quasi Judicial Forum and a Judicial or Quasi Judicial Remedy As Denial of Due Process

The Division opinion herein denied plaintiffs all access to the Courts or quasi judicial tribunals and the right to a judicial or quasi judicial remedy, 359 S.W.2d 790.

In the case of *Barbier* v. *Connolly*, 113 U.S. 27, the Court in applying the Fourteenth Amendment said (l.c. 31):

> "* * * that all persons shall be equally entitled to pursue their happiness and acquire and enjoy property; that they shall have access to the courts of the country for the protection of their person and property, the prevention and redress of wrongs, and the enforcement of contracts; * * *."

In the case of *Missouri v. Lewis*, 101 U.S. 22, the Court said (l.c. 30):

> "The Amendment (14th) could never have been intended to prevent a State from arranging and parcelling out the jurisdiction of its several Courts at its discretion. • • • provided • • • it does not • • • deny to any person the equal protection of the laws, including the equal right to resort to the appropriate Courts for redress. • • • ."

In the case of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679-683, 50 S. Ct. 451, 454, the Court said (l.c. 454):

> "[4-10] Second. If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. Ettor v. Tacoma, 228 U.S. 148, 33 S. Ct. 428, 57 L. Ed. 773. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (First National Bank of Greeley v. Weld County, 264 U.S. 450, 44 S. Ct. 385, 68 L. Ed. 784) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.
>
> • • •
>
> "But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 475, 476, 38 S. Ct. 566, 62 L. Ed. 1215."

"Fair play" is the essence of due process. *Galvan* v. *Press*, 347 U.S. 522, 530, 74 S. Ct. 737, 742, 98 L. Ed. 987.

It is not compatible with any normal concept of "fair play" to deny Barker and Jacobs a judicial forum and a judicial or quasi judicial remedy available to all others similarly situated.

Unjustifiable discrimination such as found here has been consistently held to be violative of due process. *Bolling* v. *Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 694, 98 L. Ed. 884; *Detroit Bank* v. *United States*, 317 U.S. 329, 338, 63 S. Ct. 297, 301, 87 L. Ed. 304.

All persons have a Constitutional right to stand on an equality before the bar of justice in every American Court. 309 U.S. 227, 241, 60 S. Ct. 472, 479, 84 L. Ed. 716.

The Missouri Supreme Court held in this case that the above rule was not broad enough to cover Barker and Jacobs but labeled them as outcasts, with a right but no forum and no remedy available to them. The Fourteenth Amendment guaranteed plaintiffs the preservation of their substantial right to redress by some effective procedure. *Gibbs* v. *Zimmerman*, 290 U.S. 326, 332, 54 S. Ct. 140, 142, 78 L. Ed. 342. The action of the Missouri Supreme Court deprives them of that right.

2. Impairing the Obligation of Plaintiffs' Contract.

It stands conceded that plaintiffs had a valid contract of employment and that they rendered valuable services and fully performed their employment which netted the State of Missouri the sum of $2,160,871.32 (Tr. 6, 88, 89; 359 S.W.2d. l.c. 799).

Prior to the decision herein plaintiffs had a remedy for the enforcement of the obligation of their contract under

the provisions of the Missouri Insurance Code, with right of review under the Missouri Administrative Procedure Act. The Missouri Supreme Court, *en Banc*, so stated repeatedly. In *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, the Court, *en Banc*, said (l.c. 109):

> "The General Assembly by Section 5679 (now Sec. 374.160, R.S. Mo., 1959), also has provided by methods by which *all* the expenses of the Insurance Department must be paid. We cannot read into that section and distinction between 'current' expenses and 'emergency' expenses; nor can we find where attorneys fees are excepted."

The issue in that case was the right of Weatherby, an associate of Barker and Jacobs in this litigation to collect attorneys' fees for his services in the same litigation under an identical contract of employment.

In *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825; *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 836 and *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353, the Court, *en Banc*, held plaintiffs had a remedy under the Insurance Code with right of review under the Administrative Procedure Act.

The opinion herein holds plaintiffs have no remedy under the Insurance Code or under the Administrative Procedure Act; that no judicial or quasi judicial forum is open to them but their only remedy is by supplication to the legislature (a purely legislative body with no judicial powers) which has repeatedly turned them down on similar applications when they were not barred by a declaration by the Missouri Supreme Court that they had not been deprived of "fees *legally* owed Barker and Jacobs." (359 S.W.2d, l.c. 799).

As they were unable to obtain an appropriation by the legislature before, it is apparent their chances of such relief have been entirely eliminated by this new road-block of the Missouri Supreme Court. The legislature, having refused to respond before certainly cannot now be expected to appropriate public money to pay fees not "legally owed Barker and Jacobs." The suggested appeal to the legislature makes the "remedy a shadow" and violates plaintiffs' constitutional rights. *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 62, 55 S. Ct. 555, 557.

In the case of *Faitoute Iron & Steel Co. v. City of Asbury Park, N.J.*, 316 U.S. 502, 544, 62 S. Ct. 1129, the Court said (l.c. 1135):

> "'The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plaintiff's right, but by considerations of fact,—of what the remedy amounted to in practice.' Pittsburgh Steel Co. v. Baltimore Eq. Soc., 226 U.S. 455, 459, 33 S. Ct. 167, 168, 57 L. Ed. 297."

The possibility of a legislative appropriation amounts to nothing in practice.

In the case of *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 128, 57 S. Ct. 338, the Court said (l.c. 339):

> "The Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right."

The Court then states the limitations on changing the remedy as follows (l.c. 339):

> "The particular remedy existing at the date of the contract may be altogether abrogated if another equally

effective for the enforcement of the obligation remains or is substituted for the one taken away."

Here the remedy existing at the time of the contract is altogether abrogated with no other remedy substituted.

In *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 429-431, 54 S. Ct. 231, the Court said (l.c. 237):

"The obligation of a contract is the law which binds the parties to perform their agreement. Sturges v. Crowninshield, 4 Wheat. 122, 197, 4 L. Ed. 529; Story, op. cit. Sec. 1378. • • •

"The obligations of a contract are impaired by a law which renders them invalid or releases or extinguishes them (Sturges v. Crowninshield, supra, 4 Wheat. 197, 198, 4 L. Ed. 529) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights."

The opinion of Division No. I of the Missouri Supreme Court not only impaired substantial contractual rights but destroyed the contract.

Here it was action of Division No. I of the Missouri Supreme Court that impaired and in fact altogether abrogated plaintiffs' contract. This is state action calling for the same relief at the hands of this Court as if it had been by legislative action.

In the case of *Wheeling Steel Corporation* v. *Glander*, 337 U.S. 562, 570, 69 S. Ct. 1261, the Court said (l.c. 1296):

"The State action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation."

See to like effect: *Shelley* v. *Draemer*, 334 U.S. 1, 20, 68 S. Ct. 836, 845.

3. Equal Protection of the Law:

It was conceded that plaintiffs were lawfully employed, rendered valuable services to the Division of Insurance and fully performed their contract with great success. 359 S.W.2d l.c. 792, 799.

Under such circumstances under the law of Missouri plaintiffs were lawfully entitled to recover the reasonable value of their services under procedures set up under the Missouri Insurance Code, Chapter 374, R.S. Mo., 1959.

The rule generally applied is stated by this same Division of the Court in the case of *Nibler* v. *Coltrane*, Mo. Sup., 275 S.W.2d 270, as follows (l.c. 273):

> "Under the allegations of the second count, which alone was submitted to the jury, plaintiff sought to recover the reasonable value of the services of the type and kind mentioned and rendered under the circumstances alleged. From the facts alleged an inference can be drawn that the services were not gratuitously rendered and that they had not been paid for. It was therefore wholly immaterial that the express contract alleged in the first count or re-incorporated in the second count may have been void and unenforceable for the reasons mentioned by appellant."

Plaintiffs herein have heretofore been held by the Missouri Supreme Court, *en Banc*, to be entitled to recover reasonable compensation for their services in *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Jacobs*, 295 S.W.2d 836 and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353.

In this case Division No. I of that Court holds that because plaintiffs' contract was for payment for services out of the fund collected and that part of the contract was unenforcible no fees were legally due them which could be recovered "as provided by Sections 374.160, 374.220,

374.230 and 374.260." 359 S.W.2d l.c. 799; that because there was no agreement or understanding that fees should be charged against the guilty insurance companies or paid as expense of the insurance department such statutory remedies were not available. 359 S.W.2d l.c. 799.

In so ruling Division No. I of the Missouri Supreme Court overlooked and failed to consider the fact the controlling decisions of said court, *en Banc*, in this very matter, based its rulings that plaintiffs were entitled to reasonable compensation on a rule of law and not on contract.

Such action and ruling was arbitrary and unreasonable State action following out a period of twenty years of arbitrary and unreasonable discrimination against Barker and Jacobs and denying them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

At first plaintiffs were denied recovery out of the fund because it was a sacred fund for the policyholders. *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164.

When it became apparent that there would be a large residue, far in excess of plaintiffs' fees, left after all policyholders who could be found were paid, the Court still denied plaintiffs the right to be paid out of said fund on the ground it had not lost its sacred character as a fund for policyholders. *Weatherby, Barker* and *Jacobs* v. *Jackson, Superintendent*, 358 Mo. 542, 215 S.W.2d 742.

After the money remaining in the sum of $2,160,871.32 had been escheated into the Missouri State Treasury free of policyholder the Missouri Supreme Court held the fund still retained its sacred character and was not available for payment of plaintiffs' claims. *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836.

Now after twenty years of denying Barker and Jacobs the right to be paid out of this fund recovered by their efforts Division No. I holds plaintiffs' only right to a claim was a claim against said fund which could not be enforced, and that the procedures and remedies provided by the statutes for all others having claims against the Superintendent of Insurance are not available to these plaintiffs. 359 S.W.2d l.c. 799.

Weatherby was paid from this fund $42,500 and Lauf and Cook were paid from this fund the sum of $100,000.00 for services rendered in connection with the fund. Suits were filed to recover this money back but compromised by permitting the recipients to keep the sums paid upon their waiving and releasing any other claims. (295 S.W.2d l.c. 828) Plaintiffs were paid nothing for services and were never reimbursed for their payment of the expenses of the litigation which netted the State of Missouri $2,160,871.32. (Tr. 28, 29, 6)

State ex rel. v. *Leggett*, Mo. Sup., 359 S.W.2d l.c. 792, 793.

Such action by Division No. 1 of the Missouri Supreme Court is unlawful, unreasonable, arbitrary, capricious, discriminatory and denies them due process of law and equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

In denying plaintiffs the benefit of the forums and remedies provided by the Statutes of Missouri as afforded others similarly situated the Court brought the opinion herein into direct conflict with controlling decisions of this Court in the cases of *Missouri* v. *Lewis*, 101 U.S. 22, 30, 25 L. Ed. 989; *McCabe* v. *Railway*, 235 S.W.2d 151, 161, 35 S. Ct. 69, 59 L. Ed. 169; *Barbier* v. *Connolly*, 113 U.S. 27, 31, 5 S. Ct. 357, 28 L. Ed. 923; *State of Missouri* v. *Canada*, 305 U.S. 337, 350, 351, 59 S. Ct. 232, 236, 237, 83 L. Ed. 208.

In the case of *Ohio Oil Company* v. *Conway*, 281 U.S. 146, 160, 50 S. Ct. 310, the Court in a tax case stated the general rule as follows (l.c. 314):

> "[4] With all this freedom of action, there is a point beyond which the State cannot go without violating the equal protection clause. The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S. Ct. 560, 561, 64 L. Ed. 989; Louisville Gas Co. v. Coleman, 277 U.S. 32, 37, 48 S. Ct. 423, 72 L. Ed. 770; Air-Way Corporation v. Day, 266 U.S. 71, 85, 45 S. Ct. 12, 69 L. Ed. 169; Schlesinger v. Wisconsin, 270 U.S. 230, 240, 46 S. Ct. 260, 70 L. Ed. 557, 43 A.L.R. 1224."

There does not appear to be the slightest justification for making a distinction between allowance of attorneys' fees to Jacobs and Barker and to other attorneys rendering legal services for the Insurance Division.

In the case of *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, the Court, *en banc*, stated the general rule in Missouri as follows (l.c. 109):

> "The plaintiff Weatherby was employed by virtue of the statute to assist in enforcing the insurance laws of the state. The General Assembly, by Section 5679, also has provided the methods by which *all* the expenses of the Insurance Department must be paid. We can not read into that section any distinction between 'current' expenses and 'emergency' expenses; nor can we find where attorney's fees are excepted. The section provides two methods only for the payment of

> expenses: out of appropriations from earned fees, or by assessment against the companies. The reference in this section to 'proceedings against any company,' etc., becomes clear when read in connection with Section 5685, Revised Statutes Missouri 1929, Mo. St. Ann. Sec. 5685, p. 4348, which specifically provides the method for paying such expenses."

The Barker and Jacobs claims clearly come within such general rule but for no valid reason the Missouri Supreme Court has arbitrarily, capriciously and unreasonably discriminated against these claimants.

To meet the requirements of equal protection the law must apply to all alike. In holding this law applies to all except Barker and Jacobs the opinion herein is a clear denial of equal protection to these claimants. Denial of access to the Courts and a judicial remedy, as pointed out in the section of this brief immediately following, is a denial of equal protection of the law in violation of claimants' Constitutional rights.

In the case of *Hill* v. *State of Texas*, 316 U.S. 400, 406, 62 S. Ct. 1159, 1162, 86 L. Ed. 1559, the Court said:

> "Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand."

In the case of *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison*, 301 U.S. 459, 461, 57 S. Ct. 638, the Court said (l.c. 839):

> "'It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances. Kentucky Railroad Tax Cases, 115 U.S. 321, 337, 6 S. Ct. 57, 29 L. Ed. 414; Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293, 18 S. Ct. 594, 42 L. Ed. 1037,

and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation.'"

In the case of *Smith* v. *Cahoon*, 283 U.S. 553, 566-567, 51 S. Ct. 582, the Court said (l.c. 587):

> "The point with respect to this discrimination is not that a distinction is made between common carriers and private carriers, but between private carriers themselves, although they are alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route.
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> • • •
>
> "But, in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary, and constituted a violation of the appellant's constitutional right."

There is not here the slightest justification for making a distinction between Barker and Jacobs and other attorneys lawfully employed as they were under the Missouri Insurance Code. Denying them the benefits of the procedures of the Insurance Code with right of effective review under the Missouri Administrative Procedure Act in collecting fees for services rendered the Division of Insurance while making them available to others similarly situated is capricious, arbitrary, discriminatory and in violation of their rights under the Due Process clause of the Fourteenth Amendment.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of 28 U.S.C. 1257 (2) because there was drawn in question in the Missouri Courts the validity of statutes of the State of Missouri on the grounds of repugnancy to the Constitution of the United States and the decision of the Missouri Supreme Court was in favor of their validity.

Walter A. Raymond

WALTER A. RAYMOND,
915 Grand Avenue,
Kansas City, Missouri,
Counsel for Appellants.

PROOF OF SERVICE

I, Walter A. Raymond, counsel for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served copies of the foregoing Jurisdictional Statement on all adverse parties as follows:

1. On the Superintendent of the Division of Insurance of the State of Missouri by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to Honorable Thomas F. Eagleton, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri, on the 19th day of November, 1962.

2. On the Aetna Insurance Company and other named Stock Fire Insurance Companies who were defendants in the Restitution Suit by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to their attorney of record, Honorable James M. Douglas, 705 Olive Street, St. Louis 1, Missouri, on the 19th day of November, 1962.

3. On the State Farm Mutual Insurance Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, Mr. Thomas E. Deacy, Sr., 2300 Bryant Building, Kansas City 6, Missouri, on the 19th day of November, 1962.

4. On the Hardware Mutual Casualty Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, Mr. George A. Spencer, 517 Guitar Building, Columbia, Missouri, on the 19th day of November, 1962.

Walter A. Raymond

WALTER A. RAYMOND,
915 Grand Avenue,
Kansas City 6, Missouri,
Counsel for Appellants.

UNITED STATES CONSTITUTIONAL PROVISIONS

Art. I. Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MISSOURI CONSTITUTIONAL PROVISIONS

Art. 4, Mo. Const., 1945.

§ 22. Department of revenue—director of revenue—division of collection—budget—comptroller—duties and functions.

Section 22. The department of revenue shall be in charge of a director of revenue, and shall have divisions of collection; budget and comptroller, and other divisions as

provided by law. The division of collection shall collect all taxes, licenses and fees payable to the state, except that county and township collectors shall collect the state tax on tangible property until otherwise provided by law. The division of the budget and comptroller shall assist the director of revenue in preparing estimates and information concerning receipts and expenditures of all state agencies as required by the governor and general assembly. The comptroller shall be director of the budget, and shall pre-approve all claims and accounts and certify them to the state auditor for payment.
Art. 4, Mo. Const., 1945.

§ 25. Limitation of governor's budget on power of appropriation.

Section 25. Until it acts on all the appropriations recommended in the budget, neither house of the general assembly shall pass any appropriation other than emergency appropriations recommended by the governor.

STATUTES

Section 536.105, R.S. Mo., 1949 provides:

"536.105. **Review by injunction or original writ, when —scope**

"1. When any administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such decision, such decision may be reviewed by suit for injunction, *certiorari*,

mandamus, prohibition or other appropriate action, and in any such review proceeding the court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; but the court shall not substitute its discretion for discretion legally vested in such administrative officer or body, and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body such discretion lawfully exercised shall not be disturbed.

"2. Nothing in this section of this Act shall apply to contested cases reviewable pursuant to sections 536.100 to 536.140.

"3. Nothing in this section shall be construed to impair any power to take summary action lawfully vested in any such administrative officer or body, or to limit the jurisdiction of any court or the scope of any remedy available in the absence of this section. Laws 1953, p. 678, §§ 1, 2, 3."

Section 374.220, R.S. Mo., 1949, provides:

"374.220. **Expenses, how paid.**

"1. The expenses of proceedings against insurance companies, and examinations of the assets or liabilities and valuations of policies of insurance companies doing business in this state, shall be assessed by the superintendent upon the company proceeded

against or examined, or whose policies have been valued, and shall be in the first instance paid by such company, on the order of the superintendent directly to the person or persons rendering the service.

"2. If the company has been or shall be adjudged insolvent, or shall neglect, fail or refuse to pay the expenses, the superintendent may approve the payment of the expenses, in whole or in part, which shall be paid in like manner as other expenses of the insurance division; and the amount so paid, together with costs, charges and fees for collecting the same, shall be a first lien upon all the assets and property of such company, and may be recovered by the collector of revenue in any court of competent jurisdiction; or if said company be in liquidation, or process of being wound up, the costs and expenses of settling its affairs shall be allowed and taxed as costs against said company, and shall be a first lien upon and payable out of its assets. The collector of revenue shall deposit such sums in the state treasury to reimburse the insurance fund."

Section 374.260, R.S. Mo., 1949, provides:

"374.260. **Deficiencies, how met**

"In case the expenses of this division, including the salaries paid to the superintendent and deputy superintendent, shall exceed the amount collected under Section 374.230, the superintendent shall, annually, assess upon all insurance companies doing business in this state a sum equal to such excess, which he shall collect and apply in like manner as by this chapter authorized and required in respect to the fees payable by such companies. Such assessments shall be made in proportion to the relative amounts of the assets of each company (R.S. 1939, § 5798)."

Section 374.120, R.S. Mo., 1949, provides:

"374.120. **Superintendent to appoint employees—legal adviser**

"1. He shall appoint and employ such clerks and clerical help which are necessary for a proper dispatch of the business of the department at salaries as now or hereafter provided by law, and may employ such actuarial work to be done as may be necessary, all of which expense shall be paid as provided for by Section 374.160, out of the amount appropriated by law from the fees collected by the insurance division.

"2. The attorney general shall be his legal adviser, but the superintendent may, with the approval of the governor, employ other counsel for the purpose of enforcing the insurance laws, except in criminal prosecutions.

"3. He may also employ suitable persons to make examinations as to the solvency of companies when he deems it necessary.

"4. He shall not employ any person in any capacity who is an officer, agent or employee of any insurance company or association (R.S. 1939, § 5788, A. 1949 H. B. 2115)."

Section 374.160, R.S. Mo., 1949, provides:

"374.160. **Expenses, how paid—state liability**

"All the expenses of the insurance division now or hereafter incurred and unpaid, or that may be hereafter incurred including the salaries of the superintendent and deputy superintendent, except the expenses of examinations, valuations or proceedings against any company, and for winding up, dissolving or settling the affairs of companies; which expenses are to be paid by the company, or as provided by the law, shall be paid monthly out of the amount ap-

propriated by law from the insurance division fund, on warrants issued upon such fund by the state auditor on vouchers approved by the superintendent and comptroller. The state shall not be responsible in any manner for the payment of any such expenses, or of any expenses of this division, or any charges connected therewith (R.S. 1939, § 5789, A. L. 1945 p. 1018)."

"374.230. **Fees—paid to collector of revenue**

Every insurance company doing business in this state shall pay to the collector of revenue the following fees:

(1) For an examination of the assets and liabilities of a company, not to exceed ten dollars per day for any one examiner, together with all necessary expenses incurred and actually paid and reported under oath of the examiner;

(2) For making valuations of policies or other obligations of assurance, not to exceed ten dollars for each million dollars of insurance, or fractional part thereof, for all ordinary forms of policies, and the cost of computing special evaluation tables for policy forms requiring such shall be added;

(3) For filing the declaration required on organization of each company, fifty dollars;

(4) For filing statement and certified copy of charter required of foreign companies, fifty dollars;

(5) For filing annual statement of any company doing business in this state, thirty dollars;

(6) For filing supplementary annual statement of any company doing business in this state, ten dollars;

(7) For filing any other paper required to be filed in the office of the superintendent, ten dollars each;

(8) For each agent's copy of his company's certificate of authority or license, two dollars;

(9) For copies of papers, records, and documents filed in the office of the superintendent, twenty cents per folio;

(10) For affixing the seal of office of the superintendent, one dollar (R.S. 1939 §§ 5795, 5796, A.L. 1945, p. 1018, A. 1949 H.B. 2115)."

JUDGMENT IN CASE No. 48717 IN THE COLE COUNTY, MISSOURI, CIRCUIT COURT

Thereafter, on December 12, 1960, the Court, again considering this cause, entered its Orders as follows:

Order

Now, on this 12th day of December, 1960, this cause is taken up by the Court for adjudication. The Court having previously heard arguments and considered the motion of defendant C. Lawrence Leggett, Superintendent of the Division of Insurance, to dismiss both counts of plaintiffs' First Amended Petition, finds that said motion should be sustained on the ground that both counts of said Petition failed to state a claim on which relief could be granted, and that both counts of plaintiffs' First Amended Petition should be dismissed as to defendant C. Lawrence Leggett, Superintendent of the Division of Insurance of the State of Missouri.

It is therefore ordered that defendant's C. Lawrence Leggett, Superintendent of the Division of Insurance of the State of Missouri, Motion to Dismiss as to both counts of plaintiffs' First Amended Petition be sustained, and that both counts of Plaintiffs' First Amended Petition shall be dismissed as to defendant C. Lawrence Leggett, Super-

intendent of the Division of Insurance of the State of Missouri, and that the costs shall be taxed against plaintiffs.

Filed: December 12, 1960.

JUDGMENT IN CASE No. 48716 IN THE COLE COUNTY, MISSOURI, CIRCUIT COURT

And thereafter, on December 12, 1960, the Court, again considering this cause entered its Order as follows:

Order

Now on this 12th day of December, 1960, this cause is taken up by the Court for adjudication. The Court having previously heard arguments and considered the motion of defendant C. Lawrence Leggett, Superintendent of the Division of Insurance, to dismiss both counts of plaintiffs' First Amended Petition; finds that said motion should be sustained on the ground that both counts of said petition failed to state a claim on which relief could be granted and that both counts of plaintiffs' First Amended Petition should be dismissed as to defendant C. Lawrence Leggett, Superintendent of the Division of Insurance.

It is therefore ordered that defendant's, C. Lawrence Leggett, Superintendent of the Division of Insurance of the State of Missouri, Motion to Dismiss as to both counts of plaintiffs' First Amended Petition be sustained, and that both counts of plaintiffs' First Amended Petition shall be dismissed as to defendant, C. Lawrence Leggett, Superintendent of the Division of Insurance of the State of Missouri, and that the costs shall be taxed against plaintiffs.

Filed: December 12, 1960.

Identical individual judgments were entered in favor of defendants, Aetna Insurance Company, State Farm Mutual Insurance Company and Hardware Mutual Casualty Company.

OPINION OF SUPREME COURT OF MISSOURI

HOLLINGSWORTH, Judge.

These are appeals by the legal representatives of John T. Barker and Floyd E. Jacobs, both deceased, from judgments of the Circuit Court of Cole County dismissing petitions of decedents for review of an order of the Superintendent of Insurance denying claims for attorneys fees allegedly owing Barker and Jacobs by the Division of Insurance since 1936.[1] Jurisdiction is in this court for the reasons that (1) more than $15,000 is involved in each case and (2) the Superintendent of the Division of Insurance (of Missouri) is a party defendant in each case. The first case, No. 48,716, in which the superintendent of insurance is the sole defendant, is an action for mandamus and certiorari. The second case, No. 48,717, in which the superintendent of insurance is sued and joined with him are the above named insurance companies, as representatives of certain classes of insurance companies against whom, it is alleged, an assessment of the fees herein sought could be made by the superintendent, is an action seeking a declaratory judgment and an injunction.

The facts are not in dispute. In one form or another, the basic questions here presented have been considered

1. Messrs. Barker and Jacobs died subsequent to the filing of their claims and their respective legal representatives have been duly substituted in their stead.

by this court on many occasions. In substance, as gleaned from the early case of *Aetna Insurance Company v. O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, the facts may be thus briefly stated: On October 9, 1922, the superintendent of insurance ordered a reduction of ten per cent in rates in this state on all classes of fire, lightning, hail and windstorm insurance effective November 15, 1922. Approximately 155 insurance companies filed a petition for review in the circuit court of Cole County. At the beginning of the review proceedings the trial court made an order, pursuant to a stipulation signed by attorneys for the companies and the insurance superintendent, allowing the companies to collect the old rate, on condition that in event the companies were unsuccessful they were to refund the excess premiums to the policyholders. The trial court found in favor of the companies. That judgment was reversed in this court, *Aetna Insurance Company v. Hyde*, 315 Mo. 113, 285 S.W. 65, and the mandate directed that the defendant (the superintendent of insurance) be restored all things he had lost by reason of the judgment of the trial court. In August, 1929, the companies began refunding the excess premiums collected by them under and by virtue of the stipulation and court order referred to. It, however, became apparent to the superintendent of insurance that only a portion of the excess collection of premiums was in fact refunded. In June, 1930, the superintendent of insurance, with the approval of the governor, acting under what is now § 374.120, R.S. Mo. 1959, V.A.M.S., employed John T. Barker and Floyd E. Jacobs to seek recovery of the balance of the excess premiums collected by the companies which belonged to the policyholders.[2]

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2. Statutory references, insofar as practicable, are to R.S. Mo. 1959, V.A.M.S.

The terms of the contract of employment were that if those attorneys were successful in recapturing this residue, they should be paid *from these funds* for their services such an amount as the court deemed adequate, but if they were unsuccessful in their efforts they were to receive no pay.[3] (On December 1, 1930, Glenn C. Weatherby, whose name will appear in some of the cases dealing with the facts involved, was also employed by the superintendent, with the approval of the governor, to aid Barker and Jacobs, on the same terms.)

Hearing of motions filed in the circuit court of Cole County in May, 1933, by Barker and Jacobs, resulted in a judgment rendered on December 7, 1935, against the companies requiring them to pay into court the sum of $2,750,000 in excess of the amount theretofore refunded, which was paid over to and held by the superintendent in accordance with Section 5874, R.S. 1929 (§ 379.390, R.S. Mo. 1959, V.A.M.S.), providing:

> "[U]ntil the final determination of such action, an amount equal to the difference between the rates fixed by the superintendent in his order and those in effect prior thereto, such funds to be held by the superintendent of insurance to await the result of such review, and in the event the orders and directions of the superintendent be set aside, such funds shall be returned to the companies pro rata, and in the event his orders and directions shall be sustained, then such funds shall be turned over to the policyholders pro rata."

Barker and Jacobs thereupon filed motions for allowance of fees out of the said fund of $2,750,000. The trial court made an allowance of 15 per cent as attorneys'

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3. Emphasis shown is that of this writer unless otherwise indicated.

fees out of the fund, allowing Weatherby the sum of $137,500, and Barker and Jacobs the sum of $275,000, and declaring a lien upon the fund for these amounts. The superintendent of insurance appealed to this court. The first question considered by this court in deciding the appeal was: Did the superintendent of insurance have the authority to employ the respondents in these restitution proceedings? In discussing that question, the court (in *Aetna Insurance Company* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, 1166) stated: "Before a state officer can enter into a valid contract he must be given that power either by the Constitution or by the statutes. All persons dealing with such officers are charged with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. Such power must be exercised in manner and form as directed by the Legislature. [Cases cited.]" The court in that case also quoted from 59 C.J. § 286, page 172: "Public officers have and can exercise only such powers as are conferred on them by law, and a state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution, unless such authorized contracts have been afterward ratified by the legislature. An agreement not legally binding on the state may, however, impose a moral obligation. The doctrine of estoppel when invoked against the state, has only a limited application, even when an unauthorized contract on its behalf has been performed, and thereby the state has received a benefit, and so it is held that a state cannot by estoppel become bound by the unauthorized contracts of its officers, nor is a state bound by an implied contract made by a state officer where such officer had no authority to make an express one."

The court then stated, 124 S.W.2d loc. cit. 1167: "We hold that the superintendent did have a right to employ the respondents in the restitution proceedings. But it does not follow that the superintendent of insurance had a right to make a contract of employment that respondents were to be paid for their services *out of the fund restored to him.* It is to be noted that Section 5678 (§ 374.120), *supra*, does not specify how an attorney who has been employed by the superintendent is to be paid, nor is there any provision in the insurance code as to the method. 'A statute merely giving an official power to employ counsel with consent of the governor does not convey the right to fix his compensation, * * *.' 59 C.J. 174, Section 290. It, therefore, follows that the superintendent of insurance had a right to employ the respondents, *but did not have the power to contract that their compensation should be paid out of this fund.*"

In so holding the court cited and reasserted the principles of law announced in the case of *State ex rel. Missouri State Life Ins. Co.* v. *Hall, Judge*, 330 Mo. 1107, 52 S.W.2d 174, 177, which held: "The legislative power to authorize, supervise, regulate, and liquidate insurance companies rests on the interests of the public in the insurance business. It is conceded that the state may through administrative officers supervise and regulate insurance companies in aid of solvency. If so, it has the power to protect those interested, in the event of insolvency. It is a valid exercise of the police power through administrative officers. [Cases cited.] The power was first exercised in 1869 by the enactment of an Insurance Code intended to protect policyholders, stockholders, and the public. Laws 1869, p. 23. The original Code and amendments thereto indicate an intention to regulate the business from beginning to end thereby protecting individual and public interests.

The enactment of this comprehensive Code made the state a real party in interest. The superintendent of insurance is the administrative officer in charge of that interest, and courts are without authority to interfese with his administration of the Code."

The ultimate holding in *Aetna Ins. Co.* v. *O'Malley*, *supra*, 124 S.W.2d 1164, 1168, was: "The trial court being without authority to interfere with the insurance code of this state, it follows that it erred in allowing the respondents fees from the impounded fund." As above stated, Section 5678 (§ 374.120) *supra*, does give the superintendent of insurance, with the approval of the governor, authority to employ attorneys to enforce the insurance laws of this state, *yet the only way such attorneys can be paid is like any other expense of the insurance department, that is, by an appropriation of the legislature. • • • So, in the case at bar, the respondents must look to the legislature for the payment of their fees.*" The ruling in his case has been many times approved and until recently the ruling therein announced was no longer questioned. *Weatherby* v. *Jackson*, 358 Mo. 542, 215 S.W.2d 742, 743; *Jacobs et al.* v. *Leggett, et al.*, Mo., 295 S.W.2d 825; *Barker et al.* v. *Leggett*, Mo., 295 S.W.2d 836; and cases cited in each of them.

In 1941 (Laws 1941, p. 396; now § 379.395), the legislature passed an escheat statute dealing with unclaimed funds in the hands of the superintendent of the Division of Insurance. It provided, in substance, that, after diligent effort and failure to locate the owners of any funds (which included a very substantial portion of the funds in the hands of the superintendent recovered by Barker, Jacobs and Weatherby under the restitution proceedings), it was the duty of the superintendent to pay the same to the state treasurer, and that after allowing

a period of five years for the reclamation of any portion of said funds by any *owners* of a portion thereof, *the fund was to be transferred to the general revenue fund of the state.*

Thereafter, Weatherby, Jacobs and Barker filed suits to impress any unclaimed portion of these funds remaining in the hands of the state treasurer with a lien for their fees. Unsuccessful in the trial court, they appealed to this court. In an opinion disposing of those appeals, *Weatherby, Jacobs and Barker* v. *Jackson* (three cases), 358 Mo. 542, 215 S.W.2d 742, this court stated that plaintiffs did not ask the court to overrule the opinion written in *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, but relied upon the provisions of the escheat act. (The opinion in those cases also noted that the legislature had priorly recognized *its authority* to compensate attorneys employed by the superintendent of insurance in these cases by appropriating for the use and benefit of Messrs. Barker and Jacobs the sum of $150,000 [reduced by the governor to $100,000], as shown by Laws 1931, p. 69, § 11; and further noted that in the case of *Lucas* v. *Lamb*, 348 Mo. 900, 156 S.W.2d 634, loc. cit. 637, the court, anticipating early enactment of the escheat statute, had pointedly said: "If, as contended * * *, the State shall become the ultimate beneficiary of a part of this fund, the question of [Weatherby's, Jacobs' and Barker's] reimbursement *may be addressed to the General Assembly.*") The opinion then noted that there was no language in the escheat statute that could be construed to mean that the circuit court was given authority to allow attorney fees to any person and to order them paid out of this fund, which led the court to further note that the legislature was careful to protect the fund against any claims except those of persons or corporations *to whom the money actually belonged*, and

that the claims, if at all allowable, could only be allowed by the legislature; and further *"that the cost of litigation establishing these claims should not be assessed against the fund."*

The opinion, 215 S.W.2d 742, 744, then concluded with these words: "We therefore hold that the only authority given to the circuit court by the section in question is authority to determine whether the fund, or any part thereof, belongs to any person or corporation making claim therefor. The word, 'claim,' as used in the statute, was evidently used in such a restricted sense. Certainly, in view of the decisions of this court in the various cases, holding that the claimants in the present cases must look to the legislature for payment of their claims, and further, that the Circuit Court of Cole County has no jurisdiction to allow them, the legislature had it intended to vest the court with such jurisdiction, would have said so in plain and unmistakable language. Furthermore, there is no apparent reason why the legislature would vest the circuit court with such authority. The legislature in the past has appropriated money to pay attorneys and there is no reason why it cannot do so again if it deems the claims meritorious. *Whether they are, or are not, we have no authority to say in this case.*"

Therefore, Barker and Jacobs attempted from time to time to induce the legislature to appropriate additional funds to compensate them for services rendered in procuring restoration of $2,750,000 for the benefit of Missouri policyholders. Their efforts in that respect were unsuccessful. In 1951, the balance of the fund was transferred to the general revenue funds of the state.

In 1953, Jacobs and Barker, as plaintiffs, filed two other actions, both of which again sought recovery of these

fees. The first was against C. Lawrence Leggett, superintendent of insurance, and joined with him as defendants were the state treasurer, the state auditor and director of revenue. Count one of the petition in that case sought recovery of $275,000, such sum to be impressed as a lien on the aforesaid escheated funds, and for other relief. Count two thereof sought a declaratory judgment. The second suit was against the superintendent of insurance to recover *quantum meruit* the value of their services. Motions filed by the defendants in each case to dismiss were sustained in the trial court and both cases came on appeal to this court. The judgment of the trial court was affirmed in both cases. The court also held (in the first case) that the judgment denying plaintiffs' right to enforcement of a lien against the residue of the escheated funds did not deny plaintiffs of any timely pleaded constitutional right and that neither were they entitled to declaratory relief. The first case, 295 S.W.2d 825, 831 [5, 6] [7], also recited facts and quoted from adjudicated cases clearly establishing that plaintiffs had long since waived any constitutional right granted under the 14th Amendment to the Constitution of the United States, and Section 10, Article I, of the Constitution of Missouri, V.A.M.S. In the second case, the court held that an action *in quantum meruit* would not lie, that denial of the right to recover did not deprive plaintiffs of any timely pleaded constitutional right and that the escheat law was not an *ex post facto* law. See *Jacobs et al.* v. *Leggett et al.*, 295 S.W.2d 825, and *Barker et al.* v. *Leggett*, Mo., 295 S.W.2d 836, to which cases reference is made for a more extended statement bearing upon and pertinent to the conclusions herein reached.

During the course of the opinion in the second case, 295 S.W.2d loc. cit. 840, it was also stated: "We believe it is the intent of the insurance code to vest the superin-

tendent with primary jurisdiction to *approve* the usual expenses and to *assess* the expenses of proceedings against companies. We believe this right of primary decision by the superintendent is exclusive, subject only to review by the courts in the manner provided in the insurance code or as otherwise provided by Chapter 536, R.S. Mo. 1949, V.A.M.S., and more particularly § 536.100 dealing with judicial review of administrative decisions." (Emphasis is that shown in published opinion.)

Encouraged by the recognition given by this court of the right of review provided by the Administrative Procedure and Review Act, Chapter 536, Barker and Jacobs filed with the superintendent of insurance a new application for the allowance of said fees and for recovery of expenses incurred in connection with their services. This application presented in great detail the facts above outlined. See *State ex rel. Leggett* v. *Jensen, Judge*, Mo., 318 S.W.2d 353, 355. The principal relief sought was that the superintendent:

> "(a) Accept jurisdiction of and recognize these claims and this and preceding applications as merged herein.
>
> "(b) Proceed under the Insurance Code and Chapter 536, R.S. Mo. 1949, on notice to hear and determine this application and preceding applications praying allowance of the claims as set forth herein, and to hear evidence thereon.
>
> "(c) Allow and approve these claims as expenses of the Insurance Department in a full and adequate reasonable amount as may be justified by the evidence which will be presented by the applicants.
>
> "(d) Determine whether these claims and each of them (1) should be allowed as expenses of 'proceedings' against insurance companies involved in the

> restitution proceedings, and assessed against them ratably; or (2) are usual expenses of the Division (formerly Department) of Insurance payable out of amounts appropriated by law from the Insurance Division fund on warrants issued on such fund on vouchers approved by the Superintendent and Comptroller."

The superintendent thereupon sought advice both from the attorney general and from counsel for interested insurance companies as to the proper course of procedure. The attorney general gave it as his opinion that "under the provisions of Section 374.220, R.S. Mo. 1949, you do have jurisdiction to consider and determine the application now before you. As we have pointed out above, there is no statutory requirement that a hearing for such purpose be held. We think it obvious that the Superintendent is not required to hold a hearing on every claim or question that may be presented to him for determination. However, the circumstances of the present application may be such that denial of a hearing would be considered by a reviewing court to be an arbitrary and unreasonable act. Determination of the procedure is, we feel, primarily a matter within your discretion."

Thereafter, on February 7, 1958, the superintendent, declining to afford plaintiffs a hearing on said claims, advise plaintifts' counsel by letter as follows:

> "After a careful review of all the matters which have been submitted to me in connection with the above mentioned claims, I have concluded that I am not required by law to grant a hearing upon the applications before making a decision upon them.
>
> "Even though I am not required by law to grant applicants a hearing upon their claims before deciding them, I assume that I could grant such a hearing if

I thought the same would enable me better to rule upon the claims. However, it is my view that even though I should hold a hearing on these claims and should conclude after such hearing that applicants had been lawfully employed as claimed in the applications, and had rendered valuable services pursuant to said employment, the value of the services of claimants could not be allowed as expenses of the insurance department which could be paid out of current appropriations, as provided by Section 374.160, R.S. Mo. 1949, nor could the value of said services be assessed against insurance companies as expenses of proceedings against such insurance companies as contemplated by Sections 374.160 and 374.220 R.S. Mo. 1949.

"In view of the above, I am respectfully denying your application for a hearing upon these claims, and must deny the claim."

Deeming their application to be a "contested case", as that term is defined in § 536.010, plaintiffs filed a petition for review in the circuit court of the county of plaintiffs' residence, Jackson County, as required for review of "contested cases" under § 536.110. The superintendent of insurance, challenging plaintiffs' right to a review of the superintendent to grant them a hearing on their claim for fees under the provisions of § 536.100, sought prohibition against the judge of the circuit court of Jackson County from entertaining jurisdiction of the petition for review: *State ex rel. Leggett, Superintendent, v. Jensen, Judge*, Mo., 318 S.W.2d 353. In that case this court, by majority vote held that the application filed by plaintiffs for the allowance of fees in this case was not a "contested case" as defined in § 536.100 providing for judicial review in "contested cases", and that in view of the provisions of § 536.110 fixing the venue of petitions for review of "contested cases" in the circuit court of the residence of the

plaintiffs, the circuit court of Jackson County was without jurisdiction to determine the petition for review here in question. Rather, it was held, plaintiffs' petition for judicial review of the order of the superintendent denying them a hearing on the instant application for fees was authorized by the provisions of § 536.105 and venue of an action for review of any action taken under that section was in the circuit court of Cole County, *State ex rel. State Tax Commission* v. *Walsh*, Mo., 315 S.W.2d 830, 835, and the preliminary rule in prohibition was made absolute. Anticipating the possibility of such a ruling, the plaintiffs, in the meantime, had filed in the circuit court of Cole County the petition for review here under consideration. That petition made the following contentions:

> "The aforesaid decision and action of the defendant Superintendent constitutes a denial to Barker and Jacobs of due process of law, of a hearing and opportunity to be heard, and of equal protection of the law, all in violation of the constitutions of the United States and of the State of Missouri; defendant's refusal to hear, audit, allow, and provide for adequate payment of the claim of Barker and Jacobs violates their statutory and contractual rights and denies and deprives them of substantive and procedural rights as determined in the aforesaid opinions of the Missouri Supreme Court, rendered November 12, 1956; and, in addition, constitutes a violation of the rights of Barker and Jacobs under the constitutions of the United States and of the State of Missouri in the following respects:
>
> "(a) Such denial of recourse and payment to a person by an agency or official thereof exercising judicial or quasi-judicial functions constitutes an impairment of contract in violation of Article I, Section 10, Paragraph 1 of the Constitution of the United States and of sections 13 and 14 of Article I of the Constitution of Missouri, 1945.

"(b) Such refusal and denial of payment constitutes a deprivation of relators' liberty and property without due process of law in violation of Article I, Section 10, Constitution of Missouri, 1945, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reason that Barker and Jacobs are denied and deprived of any judicial or other remedy for the enforcement of their legal, equitable, and property rights.

"(c) Such refusal and denial of payment constitutes a deprivation of the right of freedom of contract of Barker and Jacobs in violation of the Fourteenth Amendment of the Constitution of the United States.

"The aforesaid action of the defendant Superintendent in failing and refusing to entertain jurisdiction of and rule upon the claims of Barker and Jacobs from 1936 to February 7, 1958, constituted an unreasonable delay in deciding the case; and his decision and action in denying their application for allowance and payment thereof without giving them notice or a hearing, formal or informal, is unconstitutional, unlawful, unreasonable, arbitrary, capricious, involves and constitutes an abuse of discretion and rightful jurisdiction, and is *corgm non judice;* is unsupported by competent and substantial evidence upon the whole record; is in contravention of the aforesaid opinions of the Supreme Court of Missouri rendered November 12, 1956; and is contrary to the aforesaid opinion of the Attorney General of Missouri, the lawful legal advisor of the defendant Superintendent."

Section 536.105, which, in *State ex rel. Leggett* v. *Jensen*, Mo., 318 S.W.2d 353, we held controlling in the disposition of this case, provides:

"* * * and in any such review proceeding the court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was

entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; *but the court shall not substitute its discretion for discretion legally vested in such administrative officer or body and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body, such discretion lawfully exercised shall not be disturbed.*

Several contentions here made by plaintiffs have heretofore been finally adjudicated against them, of which adjudications we take judicial notice:

1. No allowance can ever be made plaintiffs for the fees herein claimed out of the $2,750,000 returned to the superintendent of insurance for the benefit of the policyholders, even though substantial portions of said fund have, by law, escheated to and become the property of the state.

2. Any allowance made those plaintiffs can be made only by the legislature as provided by § 374.160, and within the limits and in the manner therein provided. See cases, *supra*.

3. Plaintiffs have not been deprived of any constitutional right impairing the obligation of a lawful contract in violation of Article I, § 10, of the Constitution of the United States or of Article I, §§ 13 and 14, of the Constitution of Missouri. See cases, *supra*.

4. The refusal of the superintendent to recognize and allow said fees does not constitute deprivation of plain-

tiffs' liberty and property within the due process clauses of the Constitution of the United States and of the Constitution of the State of Missouri or the right of freedom of contract in violation of the Fourteenth Amendment of the Constitution of the United States. See cases, *supra*.

[1] Assuming, as did the superintendent of insurance, that Barker and Jacobs had been lawfully employed as claimed in their respective applications and that they had rendered valuable services pursuant to their employment, the sole question remaining is: Did the superintendent err in holding that the value of their services could not be allowed as an expense of the insurance department which could be paid out of their current appropriation, as provided by § 374.160?

[2] We think nothing of value can be added to what we have long since and, in some instances, frequently held ever since *Aetna Insurance Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, decided in 1938. There we found and held that the contract for fees earned by Barker and Jacobs made such fees payable only from funds realized in the restitution proceeding; that the contract providing for the *payment of any such fees out of these funds was invalid*; that Barker and Jacobs were held chargeable with knowledge of that fact and were, therefore, prevented from recovering such fees from said funds under any theory of estoppel or otherwise.

It clearly follows that the very terms of the contract for fees negate, at least inferentially, their being made a legal charge against any other fund derived from any other source whatsoever. It was not shown, nor is it contended, that there was any agreement or understanding that such fees should constitute a charge against the insurance companies who had instituted the action to set

aside the rate increase. Neither was it shown, nor is it contended, that there was any agreement or understanding that such fees were to constitute an expense of the insurance department to be paid monthly out of warrants issued by the state auditor on vouchers approved by the superintendent and controller, as provided by §§ 374.160, 374.220, 374.230 and 374.260. And, certainly, we have not been cited to any law justifying a finding under the facts here shown that the refusal of the superintendent to allow and certify them for payment by either method can be held to have deprived claimants of fees *legally* owed Barker and Jacobs.

True, it has been suggested in one or more of the opinions rendered in these cases that the legislature could recognize a moral obligation to pay for these services and of its own volition assume a quasi-legal obligation to appropriate funds for the payment of them. The superintendent of insurance, however, is merely an official of the executive branch of the state government, with powers limited to the functions prescribed by the statutes relating to the Division of Insurance. As such, he cannot be convicted of abuse of any discretionary power vested in him under those statutes in refusing to certify the fees here sought for payment by either defendant insurance companies, or any of them, or by assessing them as an expense of the Division of Insurance.

[3] When the superintendent assumed as true the facts upon which the claims were asserted and denied them, he, in effect, reviewed and ruled them on their merits, as required by § 536.105. Such review clearly constituted due process. *State ex rel. Leggett v. Jensen*, Mo., 318 S.W.2d 353, 357 [3, 4]. Moreover, such review was not violative of Article I, §§ 13 and 14, of the Constitution of

Missouri. *Aetna Ins. Co.* v. *O'Malley*, and *Jacobs* v. *Leggett*, both *supra*.

The decision herein reached makes it unnecessary to discuss the further contentions and questions raised.

The judgment of the trial court dismissing the applications for fees is affirmed.

All concur.

And thereafter and on the 31st day of July, 1962, the following further proceedings were had and entered of record in said causes, to-wit:

State ex rel. Mildred B. Johnson, Admrx. of estate of John T. Barker, deceased, et al.,
Appellants,
48,716 vs.,
C. Lawrence Leggett, Supt. of Division of Insurance,
Respondent.

Mildred B. Johnson, Admrx. of estate of John T. Barker et al., Appellants,
48,717 vs.
C. Lawrence Leggett, Supt. of Division of Insurance et al.,
Respondent.

Come now the appellants, by attorney, and file a motion for a rehearing in the above entitled cause or, in the alternative, for a transfer to the Court *en Banc*, with suggestions in support of said motion with service shown.

Appellants' Motion for Rehearing or in the Alternative for Transfer to the Court *En Banc*, and Suggestions in Support of Appellants' Motion for Rehearing or in the

Alternative for Transfer to the Court *En Banc* are in words and figures following, to-wit:

APPELLANTS' MOTION FOR REHEARING OR IN THE ALTERNATIVE FOR TRANSFER TO THE COURT, EN BANC.

("Tr. I" refers to the transcript of the record on appeal in Case No. 44254, and "Tr: II" refers to the same in Case No. 44255.)

Come now the appellants herein and move the Court to set aside the Opinion and Judgments herein and grant them a rehearing in said consolidated causes or in the alternative transfer this cause to the Court, *in Banc*, because of material matters of law and fact overlooked or misinterpreted as shown by its opinion, and because of conflict between said opinion and controlling decisions of this Court, *en Banc*, and because of deprivation of rights guaranteed appellants by the United States Constitution and conflict with controlling decisions of the Supreme Court of the United States in the following particulars:

1. The Court overlooked and failed to consider appellants' alternative contention that Sections 374.160 and 374.260, R.S. Mo., 1949, and controlling decisions of the Supreme Court of Missouri, *in Banc*, not only authorize but impose on the Superintendent of Insurance the duty to hear the evidence and determine the amount of their fees, and to obtain an allowance from the Legislature for their payment by following the budgetary provisions of the Executive Budget System provided by Chapter 33, R.S. Mo., 1949, and by Article 4, Sections 22 to 28 inclusive. (summarized by Bishop, Government of Missouri

under Constitution of 1845, 1 Vernon's Annotated Missouri Statutes, l. c. 18, 19).

2. In holding that the Superintendent and the Courts of Missouri are powerless to enforce appellants' right to be paid for services admittedly performed under a valid contract of employment the Court in this Divisional Opinion brought this opinion into direct and irreconcilable conflict with the controlling decisions of this Court, *en Banc*, in the following cases: *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836; and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, holding appellants have a valid remedy by which to enforce their right to be paid under the Administrative Procedure Act, Chapter 536, R.S. Mo., 1949.

3. In holding there was no way in which the Superintendent could provide for the payment of appellants, the Court brought this Divisional Opinion into direct and irreconcilable conflict with the controlling decision of the Court, *en Banc*, in the case of *State ex rel. Carwood Realty Co. et al. v. Dinwiddie*, Mo. Sup., 122 S.W.2d 912, 914, holding the Missouri Insurance Code provides the Superintendent with a comprehensive method to defray all the expenses of enforcing the insurance laws.

4. In refusing to take jurisdiction on the grounds that the Superintendent possessed no power to allow and provide for payment of plaintiffs, which was affirmed by the trial court and by this court, the Superintendent and the Courts denied plaintiffs access to the Courts and denied them a right to a judicial remedy in violation of the Fourteenth Amendment to the Constitution of the United States, and brought the opinion herein into direct and irreconcilable conflict with the controlling decisions of the Supreme Court of the United States as follows: *Barbier* v. *Connolly*, 113 U.S. 27, 31, 28 L.Ed. 923, 925;

Lynch v. *United States*, 292 U.S. 571, 579, 580, 54 S. Ct. 840, 78 L. Ed. 1434; *Richmond Mortgage and Loan Corp.* v. *Wachovia Trust Co.*, 300 U.S. 124, 128, 57 S. Ct. 338, 339, 81 L. Ed. 552, 555.

In denying plaintiffs the right to enforce the contract the Superintendent and the Courts deprived plaintiffs of a judicial forum and not only impaired the obligation of their contract but denied them due process of law in violation of Article I, Section 10 and the Fourteenth Amendment to the Constitution of the United States and brought this opinion into conflict with the controlling decisions of the Supreme Court of the United States in the following cases: *Lynch* v. *United States*, 292 U.S. 571, 580, 54 S. Ct. 840, 78 L. Ed. 1434; *W. B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 54 S. Ct. 816, 78 L. Ed. 1344; *W. B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 55 S. Ct. 555, 79 L. Ed. 1298.

6. In denying plaintiffs the benefit of the Administrative Procedure Act, Chapter 536, R.S. Mo., 1949, afforded others similarly situated, the Superintendent and the Courts of this State have deprived these plaintiffs of the "equal right to resort to the appropriate courts for redress" in violation of the Fourteenth Amendment to the Constitution of the United States and brought this opinion into direct conflict with controlling decisions of the Supreme Court of the United States in the following cases: *Missouri* v. *Lewis*, 101 U.S. 22, 30, 25 L. Ed. 989; *McCabe* v. *Railway*, 235 U.S. 151, 161, 35 S. Ct. 69, 59 L. Ed. 169; *Barbier* v. *Connolly*, 113 U.S. 27, 31, 5 S. Ct. 357, 28 L. Ed. 923.

7. In denying plaintiffs any effective judicial remedy for the enforcement of their valid contract the Superintendent and the Courts of Missouri have struck down or ar-

bitrarily and substantially impaired plaintiffs' liberty to contract about their affairs, thereby violating their statutory rights, and depriving them of the right to contract guaranteed them under Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States and bringing the opinion herein into conflict with controlling decisions of the Supreme Court of the United States in the following cases: *Adkins* v. *Hospital*, 261 U.S. 525, 545, 43 S. Ct. 394, 67 L. Ed. 785; *Coppage* v. *Kansas*, 236 U.S. 1, 14, 35 S. Ct. 240, 59 L. Ed. 441; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 429, 430, 54 S. Ct. 231, 237, 78 L. Ed. 413; *Richmond Corporation* v. *Bank*, 330 U.S. 124, 128, 57 S. Ct. 338, 339, 81 L. Ed. 552.

8. In holding the plaintiffs had a valid contract and were entitled to be paid but denying them the right to judicial enforcement of their contractual rights, which are also property rights, the opinion herein comes into direct conflict with the controlling decisions of the Supreme Court of the United States holding the obligation of contracts protected against impairment by the States includes the means of enforcement. *Von Hoffman* v. *Quincy*, 71 U.S. 535 (4 Wall. 535), 18 L. Ed. 403; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S 398, 429, 430, 54 S. Ct. 231, 78 L. Ed. 413; *Hall* v. *Wisconsin*, 103 U.S. 5, 10, 26 L. Ed. 302; *Faitoute Iron & Steel Co.* v. *City of Asbury Park, N. J.*, 316 U.S. 502, 62 S. Ct. 1129, 1135, 86 L. Ed. 1629; *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 36, 28 S. Ct. 7, 52 L. Ed. 78, 87; *Barbier* v. *Connolly*, 113 U.S. 27, 31, 5 S. Ct. 357, 28 L. Ed. 923; *Richmond Corporation* v. *Bank*, 330 U.S. 124, 128, 57 S. Ct. 338, 81 L. Ed. 552.

9. In ruling (Opinion p. 9) that the cases of *Jacobs* v. *Leggett*, 295 S.W.2d 825 and *Barker* v. *Leggett*, 295 S.W.2d 836, recited facts and quoted adjudicated cases showing

plaintiff had long since waived any constitutional rights the Court overlooked and failed to consider the allegations of plaintiffs; petition that plaintiffs had unadjudicated claims pending continuously before the Superintendent with amendments from time to time from 1936, until the Superintendent denied and dismissed said claims on February 7, 1958 (Tr. I, 6-7, 16, 3-4; Tr. II, 8-9, 29-30, 13-14).

10. In ruling as mentioned above in Paragraph 9 the Court overlooked and failed to consider that the *Jacobs* and *Barker* cases, 295 S.W.2d 825, 836, the Court considered the constitutional questions and specifically ruled that plaintiffs' cases were not barred on constitutional grounds but were live cases and pointed out the appropriate judicial-administrative remedy for plaintiffs, 295 S.W.2d l.c. 832, 833, 835 (17), and 840 (5) under Section 536.105.

11. In holding plaintiffs' constitutional contentions had "heretofore been finally adjudicated against them" (Opinion pp. 14-15) the Court misconstrued the former decisions and overlooked the fact such rulings were limited to the holding plaintiffs could have no lien on the fund (*Jacobs* v. *Leggett*, 295 S.W.2d l.c. 831), and that in the last three decisions of the Court *en Banc*, to-wit: *Jacobs* v. *Leggett*, 295 S.W.2d 825, 832-833, 835 (17); *Barker* v. *Leggett*, 295 S.W.2d 836, 840 (5); *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, 358-359; the Court, *en Banc*, has held that plaintiffs are entitled to relief under either Section 374.220, R.S. Mo., 1949, or Section 374.260, R.S. Mo., 1939, with right of review under the Missouri Administrative Procedure Act, Section 536.105, R.S. Mo., 1949, as an uncontested case.

12. In holding (Opinion p. 15) the only question was:

"Did the superintendent err in holding that the value of their services could not be allowed as an

expense of the insurance department which could be paid out of their current appropriation, as provided by Sec. 374.150?".

The Court overlooked and failed to consider the fact plaintiffs were contending (Appellants' Brief pp. 44-46, 53-55) the superintendent had the right to elect to follow that method or collect it from the guilty companies by assessment as proceedings against insurance companies under Section 374.220, R.S. Mo., 1949, in accordance with the decisions of this Court, *en Banc*, in the case of *Jacobs* v. *Leggett*, 295 S.W.2d 825, 835; *Barker* v. *Jacobs*, 295 S.W.2d 836, 839; *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, 358-359, 364. In the Jensen case the Court said (l.c. 363):

> "Respondent has filed a motion for rehearing or for modification of the opinion herein. However, it is not contended that the opinion is wrong in holding that review must be under Sec. 536.105. (Statutory references are to R.S. Mo. and V.A.M.S.) Therefore, there is no occasion for a rehearing; but we will consider respondent's contentions concerning modification."

13. In holding Section 374.220, R.S. Mo., 1949, does not authorize the allowance of attorney's fees in proceedings against insurance companies (Opinion 15, 16) as is the situation here, this Court erred and brought the opinion herein into direct and irreconcilable conflict with the unanimous opinion of this Court, *en Banc*, in the case of *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, 109 (2), holding this statute authorizes the allowance of attorney's fees in proceedings against insurance companies as here. The *Jacobs*, *Barker* and *Jensen* cases, *supra*, all are based on recognition of such applicability of this statute.

14. In holding that appellants could not be paid out of current appropriation, as provided by Section 374.160,

R.S. Mo., 1949, this Court made an election the Superintendent did not make. The Superintendent elected to deny appellants any remedy under either 374.160 or 374.260 and did not make an election as between them (Opinion 11). In ruling as aforesaid the opinion herein is brought into direct and irreconcilable conflict with the controlling decisions of the Court, *en Banc*, in the cases of *Jacobs*, *Barker* and *Jensen*, all holding that one of said statutes or the other applied and that only the Superintendent had the right to determine which one applied.

Wherefore, appellants pray the Court to vacate and set aside the opinion and judgment against them herein and grant them a rehearing, or if that may not be done then they request that the cause be transferred to the Court, *en Banc*, for final determination of the issues herein in a manner that will resolve the Federal Constitutional issues and the conflicts between this opinion and the controlling decisions of this Court, *en Banc*, and also resolve the conflict between his opinion and the controlling decisions of the Supreme Court of the United States.

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SUGGESTIONS IN SUPPORT OF APPELLANTS' MOTION FOR REHEARING OR IN THE ALTERNATIVE FOR TRANSFER TO THE COURT, EN BANC.

Come now the appellants and re pectfully submit the following suggestions in support of their Motion for Rehearing or in the Alternative for Transfer to the Court *en Banc*.

The Court has overlooked the alternative of a hearing by the Superintendent and fixing of the amount of compensation reasonably payable for inclusion in the budget as other expenses of the Insurance Division (Opinion page 13, Appellants' Reply Brief pp. 9-11).

Assuming that the Superintendent of Insurance could constitutionally and lawfully refuse to assess the fees of appellants for services and at the same time could constitutionally and lawfully refuse to pay appellants out of current appropriations (which appellants deny) under no circumstances could the Superintendent as Chief Officer of the Insurance Division refuse to hear the evidence, formally or informally, and determine the amount of compensation earned, for inclusion in the Executive Budget. To send appellants "to the legislature" for payment without a preliminary determination of the amount and inclusion in the budget is not only an illusory remedy, but under our Constitution of 1945 is tantamount to a denial of all relief.

Under the 1945 Constitution Missouri adopted the Executive Budget System, Sections 22 to 28, inclusive, of Article 4, of the Constitution, implemented by Chapter 33, R.S. Mo. 1949. Under this system and particularly Section

25 of Article 4 of the Constitution, the legislature has no power, even if it desired to consider an appropriation for appellants in the ordinary course of business of the legislature in paying expenses of the Insurance Division, or even to consider a private relief bill for appellants.

Section 25 of Article 4 of the Constitution reads as follows:

> "§ 25. *Limitation of governor's budget on power of appropriation*
>
> Section 25. Until it acts on all the appropriations recommended in the budget, neither house of the general assembly shall pass any appropriation other than emergency appropriations recommended by the governor."

The nature of the Executive Budget System is explained in the leading New York case of *People* v. *Tremaine*, 252 N.Y. 27, 168 N.E. 817, where the Court said (l.c. 824):

> "'The provisions for a budget system is a new and complete article of the Constitution to be read in connection with all other provisions contained therein as the latest expression of the popular will. While it in no way limits the ultimate powers of the Legislature to make appropriations (Article IV-A, Sec. 4), it regulates the executive and legislative machinery, and defines the method whereby appropriations shall be made.'"

(l.c. 828:)

> "Whatever may have been done before, new methods were to be pursued upon the adoption of this amendment; laws in force at the time fell by the way —the Constitution was to override all of the laws and start with a clean sheet. Thus we find that the

head of each department of state government, except the Legislature and the judiciary, shall submit to the Governor itemized estimates of appropriations to meet the financial needs of such department, including a statement in detail of all moneys for which any general or special appropriation is desired from the Legislature. These shall be classified according to relative importance, and in such form as to give all the information the Governor may require. Copies of these estimates should be simultaneously furnished to the designated representatives of the appropriate committees of the Legislature for their information.'"

If appellants are to be paid "like any other expense of the Insurance Department" than the compensation reasonably payable for the services lawfully rendered must be determined and budgeted like any other expense of the Insurance Department, all of which are scheduled by the Superintendent and included in the budget, otherwise Section 25, of Article 4 of the Constitution intervenes and makes the injunction to seek legislative relief, advice to do the practically impossible. Even when unfettered by the Budget Act, the legislature has several times refused to grant relief to appellants. All of this points up the illusory character of the legislative remedy admittedly sought for years without avail (Opinion p. 8).

This denial to appellants of a judicial remedy to recover compensation earned under a lawful contract when the State of Missouri benefited from their services in the sum of $2,160,871.32; this ratification of the action of the Superintendent of Insurance in repudiating and refusing to pay his lawful debts and refusing to even give appellants a hearing or fix the amount of their compensation and employing the services of the Attorney General to defeat the honest and lawful claims of appellants is a shock-

ing situation, and especially when the situation is, such that this Court finds itself powerless to right this wrong.

This suggestion that appellants' only remedy is to go to the legislature with the disapproval and long and recorded opposition of the branch of the Executive Department concerned, is about as promising of success as to advise appellants to seek their pay in the pot of gold at the foot of the rainbow.

The record of this proceeding will be certain to cause great injury to the State in the future when it becomes necessary to employ special counsel to represent the public interest against powerful special interests.

All the other expenses of the Insurance Division are handled through the Executive Budget, as they must be. Why are lawfully employed lawyers who have rendered valuable services to the State different from vendors of supplies or persons rendering other services? The Court *en Banc* held lawyers were entitled to be paid the same way as other creditors in the case of *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, 109 (2). We submit there exists no good and valid reason for this distinction and discrimination.

The denial to appellants of a remedy, judicial in character, before a Court or administrative agency, is in conflict with the controlling decisions of this Court, *en Banc*, in *Jacobs* v. *Leggett*, 295 S.W.2d 825, *Barker* v. *Leggett*, 295 S.W.2d 836 and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, as pointed out in paragraphs 2, 9, 10, 11, and 12 of our Motion, *supra*.

The said denial of a judicial hearing and judicial remedy is also a violation of the Constitutional rights of appellants guaranteed to them under the Constitution of

the United States in that said denial impairs the obligation of their lawful and fully performed contract of employment (in violation of Article I, Section 10, of the United States Constitution) as pointed out under paragraphs 5, 7 and 8 of our Motion, *supra*. Said denial also deprives appellants of due process of law and denies appellants the equal protection of the law (in violation of the Fourteenth Amendment to the Constitution of the United States), as pointed out under paragraphs 4, 5, 6 and 7.

Among the decisions sustaining our claims of violation of our constitutional rights are the following:

In the case of *Lynch* v. *United States*, 292 U.S. 571, l.c. 579, 78 L. Ed. 1434, 1440, holding that:

> "'Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. When the United States enters into contractual relations, its rights and duties are governed generally by the law applicable to contracts between private individuals.'"

Barbier v. *Connolly*, 113 U.S. 27, l.c. 31, 28 L. Ed. 923, 925, holding that:

> "The Fourteenth Amendment * * * undoubtedly intended * * * that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts.'"

Hovey v. *Elliot*, 167 U.S. 409, 42 L. Ed 215, 221; *Dartmouth College* case, 17 U.S. 518, 4 L. Ed. 629, 645; *Truax* v. *Corrigan*, 257 U.S. 312, 332, 66 L. Ed. 254, 263.

Richmond Mortgage and Loan Corp. v. *Wachovia Bank & Trust Co.*, 300 U.S. 124, 128, 81 L. Ed. 552, 556, where it was said:

> "'The applicable principle is not in dispute. The legislature may modify, limit or alter the remedy for reenforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as to seriously impair the value of the right. The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away.'"

Hall v. *Wisconsin*, 103 U.S. 5, l.c. 8 and 10, 26 L. Ed. 302, 304, involved a substantially similar suit for services wherein it was held unconstitutional for Wisconsin to deny an effective remedy to a professional man lawfully employed. In that case the Supreme Court of the United States ruled against Wisconsin quoting Chief Justice Marshall's still authoritative language from *United States* v. *Maurice* as follows:

> "'Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer. * * * It would be a novel and startling doctrine to all these classes of persons that the government might discard them at pleasure, because their respective employments were public offices, and hence without the protection of contract rights.'"

Application of the constitutional guarantee mentioned above is inconsistent with the opinion in this case.

The ruling of this Court that appellants cannot be paid as any other expense of the Division of Insurance

(Opinion 15, 16) is in direct conflict with the controlling decisions of this Court, *en Banc*, in the *Jacobs*, *Barker* and *Jensen* cases, *supra*, all holding this is a decision only the Superintendent must make in electing whether to proceed under Section 374.220 or under Section 374.260, R.S. Mo., 1949. Here the Superintendent made no choice, but declined to apply either method and this Court now rules that he cannot proceed under Section 374.220 when all the Superintendent ruled was that he could or would not proceed under or independently of either. This Court has made a choice the Superintendent did not make, and which the Court *en Banc* has held only the Superintendent could make, and brought this opinion into direct conflict with the above controlling decisions of the Court, *en Banc*.

For all the reasons set forth above in these suggestions and in our Motion for Rehearing or in the Alternative for Transfer to the Court *en Banc*, we ask that the Court grant us a rehearing herein or in the alternative that the cause be ordered transferred to the Court, *en Banc*, for final determination.

Respectfully submitted,

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and

Terence C. Porter,
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Attorneys for Appellants.

And thereafter, and on the 10th day of September, 1962, the following further proceedings were had and entered of record in said causes, to-wit:

State ex rel. Mildred B. Johnson, Admrx. of estate of John T. Barker, deceased, et al.,
Appellants,
48,716 vs.
C. Lawrence Leggett, Supt. of Division of Insurance,
Respondent.

Mildred B. Johnson, Admrx. of estate of John T. Barker et al.,
Appellants,
48,717 vs.
C. Lawrence Leggett, Supt. of Division of Insurance et al.,
Respondent.

Now at this day the Court having seen and fully considered the motion of the appellants for a rehearing in the above entitled consolidated causes or, in the alternative, to transfer said causes to the Court *en Banc*, doth order that said motion be, and the same is hereby overruled.

And thereafter, and on the 22nd day of September, 1962, the following further proceeding was filed in said causes, to-wit:

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

I. Notice is hereby given that the State of Missouri, at the Relation of Mildred B. Johnson, Administratrix of the Estate of John T. Barker, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs in case No. 48,716, and Mildred B. Johnson, Administratrix of the Estate of

John T. Barker, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs, in case No. 48,717, Appellants above named which were consolidated and ruled as one case, hereby appeal to the Supreme Court of the United States from the final order and judgment of Division No. I of the Supreme Court of Missouri, it being the highest Court in the State of Missouri in which a decision could be had by reason of the fact Division No. I of said Court overruled the Motion for rehearing of these Appellants and their alternative motion for transfer to the Supreme Court of Missouri, *en Banc* thereby precluding a hearing before the Court, *en Banc*; said order and judgment was entered on July 16, 1962, affirming the order and judgment of the Cole County, Missouri, Circuit Court, dismissing Plaintiffs' petitions as failing to state cause of action; and said motion for rehearing or in the alternative for transfer to the Court, *en Banc*, was denied on September 10, 1962.

This appeal is taken pursuant to Title 26, U.S.C.A., Section 1257. Case No. 48,716 was an action for mandamus and certiorari and case No. 48,717, was an action for declaratory judgment and injunction. The Trial Court sustained motions to dismiss Plaintiffs' petitions in both cases on the grounds of failure of said petitions to state facts upon which relief might be granted. The Missouri Supreme Court affirmed the ruling of the Trial Court.

II. The Clerk will please prepare a transcript of the record in this case, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. A true copy of the typewritten transcripts of the record on appeal filed in the Supreme Court of Missouri in said cases.

2. A true copy of the opinion and judgment of Division No. I of the Supreme Court of Missouri as adopted and promulgated by the Court, *en Banc*, as its opinion and judgment.

3. A true copy of the typewritten motion of Appellants for a rehearing or in the alternative transfer to the Supreme Court of Missouri, *en Banc*, filed in Division No. I of the Supreme Court of Missouri in said cases.

4. A true copy of the order overruling Appellants' motion for rehearing or in the alternative transfer to the Court, *en banc*.

5. True copies of all printed briefs filed by the parties in Division No. I of the Supreme Court of Missouri in said cases.

6. True copies of all entries in the records of the Clerk of the Supreme Court of Missouri in these cases in connection with the application for rehearing or in the alternative for transfer to the Court, *en Banc* and this appeal.

7. A true copy of this notice of appeal.

8. A true copy of application for stay of mandate and order thereon.

All to be included under the certificate of the Clerk of the Missouri Supreme Court in accordance with procedures in appeals from the Supreme Court of Missouri to the Supreme Court of the United States.

III. The following questions are presented by this appeal:

1. Whether the Superintendent of Insurance, the Trial Court and Division No. 1 of the Missouri Supreme Court, in holding the Superintendent of Insurance and

the Courts of Missouri are powerless to enforce Plaintiffs' right to be paid for services admittedly fully performed under a valid contract in direct conflict with controlling decisions of the Missouri Supreme Court, *en Banc*, in *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836, and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, holding they do have a specific remedy under Section 536.105, R.S. Mo., 1949, of the Missouri Administrative Procedure Act, are not arbitrary, capricious, discriminatory and deny Plaintiffs equal protection of the law and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

2. Whether in refusing to take jurisdiction and grant Plaintiffs relief on the grounds the Superintendent possessed no power or authority to allow and provide for payment of Plaintiffs' claims for services, the Superintendent, the Trial Court and Division No. 1 of the Missouri Supreme Court denied Plaintiffs access to the Courts and denied them a right to a judicial remedy in violation of the Fourteenth Amendment to the Constitution of the United States?

3. Whether in denying Plaintiffs the right to enforce the admittedly valid contract admittedly fully performed the Superintendent, the Trial Court and Division No. 1 of the Missouri Supreme Court deprive Plaintiffs of a judicial forum and not only impaired the obligation of their contract but denied them due process of law in violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States?

4. Whether in denying plaintiffs the benefit of the Administrative Procedure Act, Chapter 536, R.S. Mo., 1949, afforded others similarly situated and which the Supreme Court of Missouri, *en Banc* in the cases of *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836,

and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, held applicable, the Superintendent, the Trial Court and Division No. I of the Missouri Supreme Court have acted arbitrarily, discriminated against these Plaintiffs and deprived these Plaintiffs of the "equal right to resort to the appropriate courts for redress" in violation of the Fourteenth Amendment to the Constitution of the United States?

5. Whether in denying Plaintiffs any judicial remedy for the enforcement of their admittedly valid contract fully performed the Superintendent, the Trial Court and Division No. I of the Supreme Court of Missouri have struck down or arbitrarily and substantially impaired Plaintiffs' liberty to contract about their affairs, thereby discriminating against them and violating their statutory rights, and in doing so deprived them of their right to contract guaranteed them under Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States?

6. Whether in holding the Plaintiffs had a valid contract and were entitled to be paid but denying them the right to judicial enforcement of their contractual rights, which are also property rights, the opinion and judgment herein are capricious, arbitrary and discriminatory and deprive plaintiffs of their right to be protected against impairment by the State including the means of enforcement in violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States?

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